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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. AZAD HAJI ABDULLAH, Defendant-Appellant.	NO. 31659-2005 Ada County Case Nos. 2002-1384 (2005-21802)
AZAD HAJI ABDULLAH, Plaintiff-Respondent, vs. STATE OF IDAHO, Defendant-Appellant.	NO. 39417-2011

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE CHERI C. COPSEY
District Judge

FILED - COPY
JAN 21 2014
Supreme Court Court of Appeals
Entered on ATS by

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STATEMENT OF THE CASE

Nature Of The Case

Azad Haji Abdullah ("Abdullah"), appeals from his judgment of conviction after a jury found him guilty of first-degree murder, first-degree arson, three counts of attempted first-degree murder and felony injury to child, and his death sentence and the denial of post-conviction relief.

Statement Of The Facts And Course Of Proceedings

As repeatedly found by the district court after completion of post-conviction proceedings, the evidence that Abdullah murdered his wife, Angie Abdullah ("Angie"), is overwhelming.[1] On October 5, 2002, at approximately 2:00 a.m., Ed Kerschensteiner ("Kerschensteiner") and his wife were suddenly awakened by the doorbell ringing from "two terrified girls . . . talking about their house being on fire." (Tr., Vol.IV, p.126.)[2] The two girls were Angie's nine-year-old daughter, A.H., and A.H.'s ten-year-old friend, S.S., who was at the Abdullahs' home "to spend the night." (Id., pp.43-44, 93-94.)[3] A.H.'s three-week-old half-brother, M.A., eighteen-month-old half-brother, N.A., five-year-old half-brother, R.A., Angie, and Abdullah all lived at the house. (Id., pp.42-43.) Earlier in the evening, A.H. and S.S. watched movies in the family room and fell asleep after locking the doors and windows, with the exception of the garage door. (Id., pp.60-62.) S.S. awakened with "fire everywhere," woke A.H., and both girls escaped through the garage because the door was gone, and went to the neighbors for help. (Id., pp.69-70, 102-04.) Because the girls told him others were still in the burning house, Kerschensteiner met

---

[1] The court summarized the evidence presented by the state. (UPCPA, R., pp.8359-65.)

[2] The state will refer to the Clerk's Record from the underlying trial transcript as "R," the trial transcript as "Tr.," the post-conviction Clerk's Record as "UPCPA, R.," the post-conviction evidentiary hearing as "UPCPA Tr.," the remaining transcripts by their respective dates, and Abdullah's opening brief as "Brief."

[3] Although not used by Abdullah, pursuant to I.A.R. 35(d), the state will utilize minors' initials.

another neighbor, went to the Abdullah house, kicked the door open, hollered for Angie, but got no response, heard a baby crying, and rescued M.A. from the burning house. (Id., pp.128-29.)

When firefighters arrived, the house was "fully involved with fire through the roof." (Tr., Vol.VI, pp.236-37.) A neighbor, presumably Kerschensteiner, advised Captain John Peugh there was a possibility people were still inside, resulting in firefighters going into "rescue mode." (Id., pp.238-40.) Because of fear of "flashover," firefighters went into "defensive mode." (Id., pp.243-44.) Firefighter Brandon Rentz detailed finding N.A. in the backyard sitting with a comforter, potted plant, and toys without any evidence he was in the house during the fire. (Id., pp.365-71.) N.A.'s condition was in stark contrast to the three other children who all showed signs of being in the fire, and the comforter was large enough it could not have been carried by N.A. (Id., pp.405-10, 416-19.) Firefighter Richard Randolph described how he had searched the backyard prior to Rentz finding N.A., not seeing anyone in the backyard, learning of N.A.'s recovery by Rentz, and explaining there was virtually no chance he would have missed seeing N.A. during the first search. (Tr., Vol.VII, pp.519-24.)

Using a thermal imager, Captain Peugh located a female in the bedroom lying on a bed. (Tr., Vol.IV, pp.245-46.) Firefighter Ken Murphy described seeing Angie's body and explained the position of the body was "peculiar" because "her backside was up in the air and her face was down and appeared to be either under a pillow or something." (Id., p.477.) Firefighter Jim Gross found Angie's body and opined the positioning was "unusual." (Id., p.482.) Deputy Coroner Gary Craven responded to the scene and found Angie's body with no clothing except a brassiere (Tr., Vol.VI, p.274); her body was not in a "natural sleeping position" (id., p.276).

Angie's body was transported to the morgue (id., pp.279-81), where forensic pathologist Glen Groben conducted an autopsy (id., pp.418-36). Dr. Groben explained the body "was of a

burned female clothed in a bra but nothing else" with "soot deposition over the entire back of the body." (Id., p.419.) Dr. Groben discovered a melted plastic bag on the back of her head "that extended all the way around the neck" and was "still intact over the front of the head" (id., pp.419-21), which had a unique design, specific letters, an address, and website (id., pp.424-25; R., p.1582, Exhibit 34). Stephanie Hobbs discussed going with Abdullah days before the fire to the India Emporium and testified he made a purchase that was placed in a bag. (Id., pp.390-92, 397-99.) Detective Mo Heatherly obtained a bag from the India Emporium (id., pp.903-06; R., p.1582, Exhibit 30), which Dr. Groben opined was the same type of bag he found on Angie's head (id., pp.425-26). Reviewing the results of a carbon monoxide test, Dr. Groben opined Angie died before the fire started. (Id., pp.434-35.) After receiving toxicology test results, which were negative (id., pp.438-47), Dr. Groben opined Angie's death was "asphyxiation due to a plastic bag over the head with manner of death homicide" (id., p.447). Dr. Groben rejected suicide because of the "circumstances surrounding the case. The position of the body at the scene was totally inconsistent with suicide.... I found no drugs on board at that point in time to suggest, and no one places a bag over their head without drugs on board. And there were other things that I used that made me rule out suicide." (Id., p.448.)

Around noon on October 4, 2002, the afternoon prior to the fire, Abdullah took R.A. and drove to Salt Lake to purchase a special meat for Muslims. (Tr., Vol.IV, pp.44-45.) The following night Abdullah and R.A. were met at the airport by police and interviewed by Detective Todd Littlefield. (Id., pp.505-13; R., p.1582, Exhibit 19a.) Abdullah contended he was not in Boise at the time of the fire, but was in Salt Lake. (Id.) However, Marjorie Wood, a clerk at a Chevron gas station in Mountain Home, testified she was working the night of October 4, when Abdullah purchased soda around midnight. (Id., pp.957-62.) As the investigation

continued, more evidence established Abdullah lied when he told Detective Littlefield he was in Salt Lake the night of the fire. The investigation also revealed Angie's desire to end their marriage and the status of the couple's finances. Other evidence implicating Abdullah included: (1) Abdullah's statement to a co-worker in the summer of 2002, "it's okay to kill your wife ... if she was unfaithful -- as long as you explain to her parents, you know, why and made them an offering"; (2) the purchase at the India Emporium that was placed in the plastic bag found over Angie's head; (3) Abdullah conspicuously advised others of his trip to Salt Lake in an attempt to provide an alibi; (4) a lack of evidence establishing he was in Salt Lake from 8:08 p.m. on October 4, until 7:00 a.m. the following morning; (5) Abdullah purchased a black Halloween cape in Salt Lake Friday evening that resembled a cape found outside the house in Boise at the time of the fire from which his DNA could not be excluded (6) he purchased two gas cans in Salt Lake on Friday evening one of which resembled a gas can found on the driveway at the house in Boise at the time of the fire and from which his DNA could not be excluded (7) Abdullah asked a friend, Moctar Ba, to lie to police regarding the gas cans purchased in Salt Lake; (8) gas purchased in Salt Lake had the same additive as gas found at the house; and (9) hairs on his arm appeared to have been singed. This evidence is further discussed in section III(C) below.

On November 15, 2002, an Indictment was filed charging Abdullah with Angie's first-degree murder, first-degree arson, three counts of attempted first-degree murder stemming from A.H., S.S., and M.A. barely escaping the fire, and felony injury to child based upon N.A. being placed in the backyard by the fire. Gus Cahill and Amil Myshin were appointed to represent Abdullah. (R., pp.24-26.) The state filed a Notice of Intent giving notice it intended to rely upon four statutory aggravating factors: (1) "[t]he defendant knowingly created a great risk of death to many persons" ("great risk"); (2) "[t]he murder was especially heinous, atrocious or cruel,

manifesting exceptional depravity" ("HAC"); (3) "[b]y the murder or circumstances surrounding its commission, the defendant exhibited utter disregard for human life" ("utter disregard"); and (4) "[t]he defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society" ("propensity"). (R., pp.44-45.) On June 19, 2003, privately retained attorneys Kim and Mitchell Toryanski ("Kim" and "Mitch") filed a Notice of Appearance to represent Abdullah (R., pp.142-48), were permitted to substitute for Cahill and Myshin (R., p.132), and filed a Notice of Defense of Alibi on August 5, 2003 (R., pp.161-62).

However, the Toryanskis' defense of Abdullah was significantly impacted by the lies he told them and the rabbit trails they followed that "didn't pan out" because of the lies, which were so numerous Kim was unable to remember all of them (UPCPA, Tr., pp.457-59) and which Mitch explained was like "fighting with one arm tied behind [his] back" (id., p.1204). Abdullah told the Toryanskis and one of their investigators he was never in Boise the night of the fire, he was in Boise, he was at the house, he moved Angie's body, he put a bag over Angie's head to catch fluids, he "poured gas and did stuff," and then changed his story stating he was not in Boise and Angie had him followed to Salt Lake by an unknown individual who took the gas can and cape. These stories significantly impacted the Toryanskis' theory of the defense, were contradictory and inconsistent with their investigation and the evidence, and resulted in leads that did not "pan out." (Id., pp.457-76, 508-22, 677-82, 685-95, 698-99, 707-19, 721-32, 743-58, 794, 815-16, 823, 846-51, 862, 1000, 1128-29, 1146-47, 1204-16, 1219-25.)

Documents Abdullah gave to the Toryanskis confirmed their testimony from the evidentiary hearing regarding his lies, including, for example, an undated letter he wrote to them. (UPCPA, R., pp.3750-51.) In another letter, Abdullah wrote to Toryanskis, "Wondering what I

will say this time?" (Id., p.3611.) After the defense commenced its case, Abdullah sent a letter to Toryanskis, again changing his story and contending Angie had someone follow him to Salt Lake, that an unknown individual allegedly took the gas cans and Halloween cape, and implying Abdullah never left Salt Lake. (Id., pp.3613-14.) Abdullah's different stories required the Toryanskis to "retain some flexibility," particularly since they were unaware if he would choose to testify and what version he would present if he testified (UPCPA, Tr., pp.522-23), resulting in them using an "umbrella theory" that included challenges to the state's evidence, Angie allegedly being suicidal, and poor police work (id., pp.529-30). Nevertheless, the Toryanskis consulted over twenty expert witnesses some of whom testified at trial or sentencing, retained two investigators (one in Salt Lake and one in Boise), a mitigation expert, and consulted with several attorneys experienced in defending capital cases. (UPCPA, Tr., pp.566-70.) Pursuant to the court's instruction, a Notice of Compliance Regarding Expert Witnesses was filed on November 23, 2003. (R., pp.552-64.) They also sought suppression of Wood's identification of Abdullah (R., pp.179-80), which resulted in an evidentiary hearing (Tr., Vol.I, pp.275-345), but was denied by the court (id., pp.351-62).

As a result of a December 10, 2003 letter from the Toryanskis (R., p.1584, Exhibit 110), Dr. Groben had some additional testing of Angie's blood completed, which resulted in a finding of a "potentially lethal" level of Fluoxetine or Prozac that immediately caused him concern (Tr., Vol.VI, pp.467-73). Additional testing was completed, resulting in Dr. Groben amending the "cause of death" to "acute Fluoxetine poisoning associated with asphyxiation due to a bag over the head"; he did not amend the manner of death, which was still homicide. (Id., pp.473-80.) More testing was completed, confirming a potentially lethal concentration of Fluoxetine in Angie's blood. (Id., pp.483-89.) This additional testing did not cause Dr. Groben to change his

opinion regarding either the cause or manner of death "because of all of the other circumstances involved in the case." (Id., p.489.) However, the state was permitted to amend the indictment to reflect a change in the manner of death - murdering Angie "by suffocating her and/or by acute Prozac (fluoxetine) poisoning." (R., p.701.)

A jury questionnaire was compiled by the parties and the court, and voir dire commenced September 3, 2004 (Tr., Vol.I, p.591) and was completed September 23, with both parties accepting the jury as impaneled (Tr., Vol.III, p.813).[4] The state gave its opening statement (id., pp.16-36), while Abdullah reserved his opening until the state rested its case (id., p.36), which occurred November 9, 2004 (id., p.528). After a colloquy with the court, Abdullah chose not to testify. (Id., pp.871-72.) The jury found him guilty of all charged offenses. (R., pp.1491-06.)

A capital sentencing commenced immediately before the same jury (Tr., Vol.VIII, p.206) and was not completed until November 23, 2004, when the jury found beyond a reasonable doubt that the state had proven two statutory aggravating factors – great risk and utter disregard – and that, when weighed against each aggravator individually, all mitigating circumstances were not sufficiently compelling to make the death penalty unjust; the jury could not reach a unanimous decision on the other two statutory aggravators – HAC and propensity. (R., pp.1497-99.) Pursuant to the jury's verdict, on March 4, 2005, Abdullah was sentenced to death for Angie's murder (R., pp.1546-58), and to a fixed twenty-five years for first-degree arson, a fixed fifteen years for each count of attempted first-degree murder, and a fixed ten years for felony injury to child, all to be served consecutively (R., pp.1553-58).

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[4] Juror 5 was subsequently excused because of a new job opportunity and allegedly being dishonest with the district court. (Tr., Vol.IV, pp.1-11.) Kim asked to question the panel to determine whether Juror 5 "tainted" the jury; her request was denied. (Id., p.12.)

With the assistance of the State Appellate Public Defender ("SAPD"), Abdullah filed his initial Petition for Post-Conviction Relief on April 15, 2005. (UPCPA, R., pp.17-38.) After filing an amended petition (UPCPA, R., pp.178-345) and before the state filed its answer (id., pp.1453-574), Abdullah filed a Motion for Partial Summary Dismissal regarding his ineffective assistance of trial counsel claim for failing to object to various jury instructions (id., pp.1212-45). Noting the premature nature of Abdullah's motion, particularly since the parties were aware Abdullah would be permitted to again amend his petition, the state objected. (Id., pp.1290-96.) The state's answer was filed on April 10, 2008. (Id., pp.1453-1574.)

Abdullah's 346-page Final Amended Petition was filed August 29, 2008 (id., pp.1736-2082), which included a plethora of attachments (id., pp.2083-5545), including his affidavit (id., pp.2716-67). The state filed a Motion for Summary Disposition (id., pp.5837-38) and a consolidated answer and brief supporting its motion (id., pp.5840-6053). While not expressly addressing the parties' motions for summary disposition, the court ordered an evidentiary hearing and required the parties to provide "a list of those issues that need not be addressed at the evidentiary hearing." (Id., pp.6464-65.) A stipulation was filed explaining that Claims I, K, S, U, X, Z, AA, BB, and DD did not require an evidentiary hearing (id., pp.6484-86) and another stipulation was filed regarding admission of various exhibits and "areas of controversy" (id., pp.7780-83). The state also filed a motion to strike various addendums or portions thereof from Abdullah's Final Amended Petition. (Id., pp.6725-86.) Addressing the state's motion, the court reaffirmed the parties were only required to present testimony regarding "facts that are in dispute," but also warned that evidence supporting guilt-phase claims "should comply with the Rules of Evidence, including hearsay," but evidence supporting sentencing-phase claims must merely be "relevant" because of the relaxed standards for admission of evidence during a capital

sentencing. (Id., pp.7550-51.) The court then addressed each of the state's concerns in its motion to strike, granting and denying various aspects of the motion. (Id., pp.7552-74.) The evidentiary commenced on September 2, 2010 (UPCPA, Tr., p.7) and was completed after several days of testimony (id., pp.7-1401), with Abdullah declining to testify (id., pp.1389-92). However, the state stipulated, "not to the truth or credibility of [Abdullah's] affidavits, but to the -- the idea that they be admitted only to give context to the lines of inquiry that were pursued in the hearing." (Id., pp.1399-1400.) The court agreed to consider the affidavits as follows:

> [F]irst, to the extent there are not -- there is no dispute between -- among the parties, I clearly will accept them as true.
>
> With respect to those areas where -- and I can give a -- several examples, examples where he claims that, for example, the -- the stories were coming from the Toryanskis to him. That will give context to the -- to the court's decision, but I'm not required to accept those as true. I will only accept it for the fact that's what he says. I still have to make a credibility determination as to whether I believe Mr. Murphy and the Toryanskis. And I will rely in part not just on their testimony, but on the existence of the documents that support that testimony.
>
> So I agree with [the prosecutor], I don't want to -- I don't want holes in what the Court considers. So I certainly am going to consider his affidavit.

(UPCPA, Tr., pp.1400-01.)

The district court denied Abdullah post-conviction relief, noting it considered all the affidavits and attachments submitted by Abdullah with his Final Amended Petition "other than those affidavits or parts of affidavits previously stricken," but explained the court did not necessarily find "them credible where not supported by the record or where witnesses who testified differently were found credible by the Court." (Id., pp.8356-57.) Addressing the Toryanskis' credibility at the evidentiary hearing, the court found them "credible and that their testimony was remarkably consistent on material issues" particularly "given the fact that some of

the testimony was based on matters and conversations that had occurred more than five and one-half (5½) to six (6) years before." (Id., p.8373.) The court made additional findings, including:

> Abdullah irrefutably misled and lied to his trial counsel and his investigator from the very beginning of their representation in several material respects. He lied by, among other things, identifying potential alibi witnesses who he later confessed did not exist and by constantly changing his story throughout their representation. This lying continued throughout the trial. However, the one consistency in his various versions always involved his presence at the scene.

(Id., pp.8373-74) (footnotes and emphasis omitted).

Based on the testimony and documentary evidence from the hearing and filed in support of his Final Amended Petition, the court found "Abdullah is profoundly dishonest and consistently misled his defense team during pre-trial and trial. This placed them in an untenable position." (Id., p.8376.) While the court rejected most of Abdullah's ineffective assistance of counsel claims ("IAC") because he failed to establish prejudice, the court also determined many of his claims could also be dismissed based upon his failure to establish deficient performance, particularly since the Toryanskis' decisions were tactical in nature based upon an attempt to develop a strong defense irrespective of their client's repeated lies and deception and he failed to establish those decisions were made without adequate investigation. (Id., pp.8429-8580.) Judgment dismissing the Final Amended Petition was filed October 14, 2011 (UPCPA, R., p.8697) and Abdullah filed a timely notice of appeal on November 25, 2011 (id., pp.8598-8604).

ISSUES

The state wishes to rephrase the issues on appeal as follow:

1. Has Abdullah failed to establish the district court abused its discretion by denying his requests for appointment of a DNA expert at trial?

2. Has Abdullah failed to establish fundamental error regarding the question of whether Jurors 59 and 81 were biased?

3. Because there is substantial evidence upon which a reasonable jury could have found him guilty of all six crimes for which he was convicted, has Abdullah failed to meet his burden of establishing there was insufficient evidence?

4. Has Abdullah failed to establish fundamental error regarding his guilt-phase jury instruction claims?

5. Has Abdullah failed to establish the district court erred by admitting Angie's statements to her mental health providers and divorce attorney to rebut his defense that she committed suicide?

6. Has Abdullah failed to establish the district court erred by admitting his statement to co-workers that, in his home country, it is legal to kill an unfaithful wife?

7. Has Abdullah failed to establish the district court erred by refusing to admit evidence regarding Angie's life insurance policy?

8. Has Abdullah failed to establish fundamental error as a result of prosecutorial misconduct claims based upon closing arguments during the guilt-phase?

9. Has Abdullah failed to establish fundamental error regarding the oath taken by the bailiffs?

10. Has Abdullah failed to establish fundamental error regarding the non-recording of the bailiffs' oath?

11. Has Abdullah failed to establish the district court's findings involving the grand jury are clearly erroneous?

12. Because changes to Idaho's capital sentencing scheme are procedural, has Abdullah failed to establish a violation of the *Ex Post Facto* Clause and due process?

13. Has Abdullah failed to establish the death penalty violates the Eighth Amendment because of evolving standards of decency?

14. Has Abdullah failed to establish statutory aggravators must be alleged in the Indictment with factual support?

15. Has Abdullah failed to establish the four statutory aggravating factors alleged by the state in its Notice of Intent are unconstitutionally vague?

16. Has Abdullah failed to establish this Court's narrowing of statutory aggravators violates the separation of powers doctrine?

17. Has Abdullah failed to establish fundamental error regarding Angie's step-sister's victim impact statement?

18. Has Abdullah failed to establish fundamental error as a result of prosecutorial misconduct claims based upon closing arguments during the sentencing-phase?

19. Has Abdullah failed to establish fundamental error regarding his sentencing-phase jury instruction claims?

20. Has Abdullah failed to establish fundamental error associated with the court's decision regarding the breadth of his allocution and whether that ruling violated due process?

21. Has Abdullah failed to establish cumulative sentencing error?

22. Has Abdullah failed to establish the district court abused its discretion by denying his discovery request for proprietary information maintained by Dr. Colucci?

23. Has Abdullah failed to establish fundamental error regarding the destruction of counsels' jury questionnaire forms?

24. Has Abdullah failed to establish the district court applied an erroneous prejudice standard for ineffective assistance of counsel claims?

25. Has Abdullah failed to establish the district court erred by denying his IAC claims stemming from the discovery and removal of Angie's letter to Abdullah by Glen Elam while Elam and Cahill were investigating the fire scene?

26. Has Abdullah failed to establish the district court erred by denying his IAC claims regarding the preparation and presentation of mitigation evidence, including cumulative testimony from additional family members and a new cultural expert on the "Kurdish experience"?

27. Has Abdullah failed to establish the district court erred by denying his IAC claim regarding Toryanskis' tactical decision associated with not presenting expert testimony on eyewitness identification?

28. Has Abdullah failed to establish the district court erred by denying his IAC claim regarding Toryanskis' tactical decision associated with not presenting expert testimony that Angie's manner of death was allegedly "undetermined"?

29. Has Abdullah failed to establish the district court erred by denying his IAC claim regarding Toryanskis' tactical decision associated with not presenting expert testimony on the gas additive?

30. Has Abdullah failed to establish the district court erred by denying his IAC claim involving Toryanskis' tactical decision to not object to the admission of a letter written by Mitch requesting additional testing by Dr. Groben?

31. Has Abdullah failed to establish the district court erred by denying his IAC claim stemming from Toryanskis' tactical decision to delay giving an opening statement until the end of the state's case-in-chief?

32. In light of his constantly changing stories and admissions to the Toryanskis that he was in Boise at the time of the fire, has Abdullah failed to establish the district court erred by denying his IAC claim based upon Toryanskis' tactical decision to present a suicide defense as opposed to an alibi defense?

33. Because of the overwhelming evidence presented by the state, has Abdullah failed to establish the district court erred by denying his IAC claim based upon Toryanskis' tactical decision to argue Abdullah did not murder Angie, but during closing argument that he was in Boise at the time of the fire?

34. Has Abdullah failed to establish the district court erred by denying his IAC claim regarding Toryanskis' advice that he not testify at the trial?

35. Has Abdullah failed to establish the district court erred by denying his IAC claim regarding Toryanskis' advice about his allocution?

36. Has Abdullah failed to establish the district court erred by denying his IAC claims regarding Toryanskis' tactical decisions involving voir dire, challenges for cause, and utilization of peremptory challenges?

37. Has Abdullah failed to establish the district court erred by denying his IAC claims regarding guilt and penalty-phase jury instructions?

ARGUMENT

I.
Abdullah Has Failed To Establish The District Court Abused Its Discretion By Denying His Requests For Appointment Of A DNA Expert

A. Introduction

Abdullah contends his constitutional rights were violated by the district court's refusal to provide him a DNA expert "to evaluate the DNA evidence, advise the defense whether additional testing was necessary, and to testify on [his] behalf." (Brief, p.10.)[5] Because the

[5] The DNA evidence involved genetic material retrieved from swabs taken from a gas can and a Halloween cape Abdullah purchased in Salt Lake. While Abdullah also requested assistance to evaluate a plastic bag on Angie's head and latex gloves found at the murder scene, this requested testing is only mentioned as background in his opening brief (Brief, p.9), and because he has

state's DNA testing was largely exculpatory, and a shop owner identified Abdullah as the purchaser of the cape and a videotape showed Abdullah purchasing gas cans, Abdullah has failed to establish the district court abused its discretion.

B. Standard Of Review

"[D]enial of a request for expert assistance will not be disturbed on appeal absent a showing that the trial court abused its discretion," State v. Olin, 103 Idaho 391, 395 (1982), which requires this Court to ask: "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason," State v. Hedger, 115 Idaho 598, 600 (1989).

C. The District Court Did Not Abuse Its Discretion

Abdullah filed an *ex parte* motion requesting the court appoint several experts, including a forensic scientist "to evaluate the State's DNA evidence, as taken from the remains of a gas can and an item of clothing found in the driveway of the crime scene." (R., p.1576A, Mtn. to Approve Def's *Ex Parte* App. for Costs, pp.5-6.) Recognizing Abdullah failed to even identify a forensic expert, let alone provide a resume or budget, the court denied his request, concluding he failed to allege the DNA evidence was tainted, improperly prepared, or otherwise explain how a forensic expert would aid his defense. (Id., Ord. Re. Def's *Ex Parte* App. for Costs.)

Abdullah renewed his request, explaining an expert was needed to "discredit and/or explain the conclusions of the State's DNA expert." (Id., *Ex Parte* Mtn. to Supp. App. for Costs, pp.4-5.) He attached a report from LabCorp, where swabs taken from the gas can handle and clippings from the cape were tested. (Id., Attach. K, p.1.) Analyzing "preps" from the gas can

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failed to provide any argument explaining how the district court abused its discretion regarding the bag and gloves, any such claim is waived. State v. Zichko, 129 Idaho 259, 263 (1996).

handle, LabCorp opined the DNA was "consistent with a mixture of DNA from more than one individual" and Abdullah was excluded as a contributor. (Id.) Analyzing the "preps" from the cape, LabCorp opined the DNA was "consistent with a mixture of DNA from more than two individuals" and Abdullah was excluded as a "major contributor" but could not be excluded as a "minor contributor." (Id., p.2.) Recognizing the report "appears to exculpate the Defendant, at least in part," the court questioned "how a DNA expert would aid in [Abdullah's] defense," and denied the motion. (R., p.1576, Ord. Regarding Def's *Ex Parte* Supp. App. for Costs, p.5.)

"[W]hat constitutes the basic tools or necessary services of an adequate defense has not been clearly defined and may indeed vary from case to case." State v. Olin, 103 Idaho 391, 394 (1982). Nevertheless, in State v. Lovelace, 140 Idaho 53, 65 (2003) (citations omitted) (quoted in State v. Dunlap, 2013 WL 4539806, *30 (Idaho 2013)), this Court discussed the legal standards for appointment of an expert to indigent defendants:

> The constitution does not require a state to provide expert or investigative assistance merely because a defendant requests it. A defendant's request for expert or investigative services should be reviewed in light of all circumstances and be measured against the standard of "fundamental fairness" embodied in the due process clause. Before authorizing the expenditure of public funds for a particular purpose in an indigent's defense, the trial court must determine whether the funds are necessary in the interest of justice.

Relying upon trial testimony from the state's DNA expert, Abdullah contends the district court abused its discretion because the DNA evidence was the "linchpin to connect [him] to the [gas can and Halloween cape] found at the scene." (Brief, pp.11-13.) Abdullah has failed to explain how the appointment of a DNA expert could have been used to challenge the testimony from the state's DNA expert. More importantly, because the issue is whether Abdullah made a "threshold showing that the requested assistance would have probable value to address what will be a significant factor in the defense against the charge, such that the accuracy of the fact-finder's

determination would be called into question if the assistance were denied," State v. Nevarez, 147 Idaho 470, 474 (Ct. App. 2009), his reliance upon trial testimony is misplaced. The information Abdullah provided to the district court established the "preps" associated with the gas can handle were "consistent with a mixture of DNA from more than one individual" and excluded Abdullah as a contributor. (R., p.1576A, *Ex Parte* Mtn. to Supp. App. for Costs, Attach, K, p.1.) While Abdullah was not excluded as a "minor contributor" on the "preps" from the cape, they were "consistent with a mixture of DNA from more than two individuals," and he was excluded as a "major contributor." (Id., p.2.) Defense counsel exploited this information during cross-examination. (Tr., Vol.VI, pp.1020-22.) Moreover, "[Abdullah] presented no reason to suspect that [LabCorp's] testing was flawed, that its procedures were questionable, or that it had a history of inaccurate testing." State v. Martin, 146 Idaho 357, 363 (Ct. App. 2008).

Finally, because of other evidence connecting Abdullah to the cape and gas can, the DNA testimony was hardly a "linchpin," but was cumulative evidence. Ileen Davis testified that the evening of Angie's murder, Abdullah, accompanied by a young boy, purchased a Halloween cape in Salt Lake that appeared to be the same as the cape found at the fire. (Tr., Vol.V, pp.74-80.) Davis' testimony was corroborated by a merchant's receipt signed by Abdullah at the time of purchase (Id., pp.71-74; Exhibit 57) and the customer's copy of the receipt found in Abdullah's wallet (id., pp.17-18, 20; Exhibit 22). A surveillance tape from Food 4 Less was analyzed by Detective Chip Morgan who identified a sequence of images showing Abdullah's arrival at the store with his son on the same date he purchased the cape walking up and down the aisles and purchasing two red gas cans. (Id., pp., 209-10, 408-14; Exhibit 49.)[6] The customer's

[6] Detective Morgan isolated the images and made a sequential pictorial file of just the frames showing Abdullah. (Tr., pp.413-22; Exhibits 77A-W.)

copy of the receipt from the gas can purchase was also found in Abdullah's wallet (id, pp.19-20; Exhibit 22)[7] and reconciled with a journal tape from the store (id., pp.184-88; Exhibit 48).

Additionally, after lying to police, Abdullah called his friend, Moctar Ba, and requested he contact Khaja Shuab Din, the Imam or spiritual leader of the Salt Lake Mosque, and ask Din to engage in conduct to facilitate Abdullah's lie to the police regarding the gas cans; Ba refused as "a matter of principle." (Tr., Vol.IV, pp.334-38.) Failing to enlist Ba's assistance, Abdullah called Din and left a message asking him to purchase a phone card and call him at a specific time. (Tr., Vol.V, pp.143-45.) Din called Abdullah who asked Din to purchase two cans of gas, empty the gas, and then leave the containers in Abdullah's van that had been left in Salt Lake because he was going to lie to police regarding the location of the cans. (Id., pp.145-46.) Din refused because "things didn't match." (Id., p.147.) Whether this Court examines Abdullah's threshold showing prior to trial or the evidence presented at trial, he has failed to establish the district court abused its discretion by denying his requests for a DNA expert.

Finally, any alleged error resulting from the court's decision is harmless. Trial error will be deemed harmless if the state establishes beyond a reasonable doubt that the error did not contribute to the verdict. State v. Perry, 150 Idaho 209, 221-22 (2010). Harmless error has been applied in other jurisdictions when the trial court erroneously denied the appointment of an expert. *See, e.g.,* White v. Johnson, 153 F.3d 197, 201 (5th Cir. 1998) ("Three other circuits have expressly concluded that *Ake* error is subject to harmless-error analysis and we now join them."); Angel v. Commonwealth, 704 S.E.2d 386, 395-96 (Va. 2011). Based upon the plethora of evidence "linking" Abdullah to the cape and gas can, any alleged error from the district court's decision is harmless, particularly considering the *de minimus* value of the DNA evidence.

[7] Exhibit 22 includes several receipts found in Abdullah's wallet that were not marked individually when admitted into evidence. (Tr., Vol.V, pp.17-22.)

II.
Abdullah's Claim Regarding Jurors 59 and 83 Is Invited Error, Was Not Preserved For Appeal, And Abdullah Has Failed To Establish Fundamental Error

A. Introduction

Abdullah concedes he did not object to seating jurors 59 and 83 and, therefore, his claim that both jurors were biased is governed by Perry fundamental error. (Brief, p.13.) Any alleged error was invited, he has failed to provide the entirety of the state court record for direct appeal, and he has failed to meet the test for fundamental error.

B. Standard Of Review

"The decision whether a juror can render a fair and impartial verdict is directed to the sound discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Yeager, 139 Idaho 680, 688 (2004).

C. The Claims Regarding Jurors 59 And 83 Involve Invited Error

At the conclusion of voir dire, Abdullah passed jurors 59 and 83 for cause. (Tr., Vol.II, p.868; Vol.III, p.343.) "The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error. One may not complain of errors one has consented to or acquiesced in." State v. Norton, 151 Idaho 176, 187 (Ct. App. 2011) (citations omitted). Because Abdullah acquiesced to seating Jurors 59 and 83, he is barred from raising any alleged bias on appeal. *See* U.S. v. Decoud, 456 F.3d 996, 1016 (9th Cir. 2006) (applying invited error doctrine to biased juror claim but concluding counsel did not invite error).

Abdullah also references the questionnaire forms that were completed by each venireman. (Brief, pp.15-18.) However, the questionnaires are not part of the record on appeal. Indeed, Abdullah has merely cited them as "Juror Questionnaire," referenced the respective juror number with the questionnaire, and cited a page number from the questionnaire; there is no other

reference to where in the record the questionnaires are located. Missing parts of the record are presumed to support the action of the trial court. Stuart v. State, 145 Idaho 467, 471 (2007). Because the questionnaires are not part of the direct appeal record, Abdullah's claim fails.

D. Abdullah Has Failed To Establish Fundamental Error

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398 (Ct. App. 2000). Whether the issue was preserved is a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459 (Ct. App. 1989). Absent a timely objection, appellate courts of this state review an alleged error under the fundamental error doctrine. Perry, 150 Idaho at 227. Review under the fundamental error doctrine requires Abdullah to demonstrate the error he alleges: "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Id.

Abdullah's claim fails the first prong because he has not established Juror 59 or 83 were unconstitutionally biased. A criminal defendant has a constitutional right to trial by an impartial jury. U.S. Const. amends. V, VI, XIV; Idaho Const. art. 1, §§ 7, 13. "However, even a juror's expression of his own opinion of the case during voir dire does not render him partial. A juror is presumed to be impartial." State v. Ellington, 151 Idaho 53, 69 (2011).

Abdullah's complaint regarding Juror 59 stems from answers he gave regarding his prior involvement with law enforcement and his alleged belief that testimony of law enforcement witnesses is more credible, which Abdullah contends establishes "actual bias." (Brief, pp.15-17.) "Actual bias is defined as 'the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which, in the exercise of a sound discretion on

the part of the trier, leads to the inference that he will not act with entire impartiality.'" State v. Houser, 143 Idaho 603, 609 (Ct. App. 2006) (quoting I.C. § 19-2019(2)). While Juror 59 noted he had been an intern with the Moscow Police Department and a criminal justice major, he expressly stated, "Oh, no," when asked if those experiences made him more "favor[able] [for] the prosecution over the defense." (Tr., Vol.II, pp.850-51.) When asked if attempts to become employed by various law enforcement agencies would cause him to give police witnesses more credibility, Juror 59 stated, "No." (Id., p.552.) And when asked if he would be able to "find that their testimony is not credible if, in fact [he] believe[d] it was not credible," Juror 59 responded, "I would look at it either way. Not from the point of view of the job, but the person." (Id., pp.852-53.) Exclaiming "No," when asked by the prosecutor if he had "any hesitation" whether he would be biased or prejudiced because of his prior experience with law enforcement, Juror 59 reaffirmed his lack of bias. (Id., pp.861-62.) Although Juror 59 admitted he "tend[ed] to believe" law enforcement more than other witnesses, when asked, "If you were instructed by the judge that you were to consider all witnesses in equal fashion, do you think that's something you could do," he responded, "I think, yeah, if I was instructed. I guess the same as going back to the law, **you have to put your personal opinions aside**." (Id., p.865) (emphasis added).

Abdullah contends because "no such instruction was ever requested or provided," he has established Juror 59 was actually biased. (Brief, p.16) Abdullah is wrong because the following instruction was given, "The law requires that your decision be made solely upon the evidence before you. Neither sympathy nor prejudice should influence your deliberations" and "[i]n determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts." (R., p.1578, JI 4.) Importantly, the entirety of voir dire must be examined,

not just a snippet, particularly when it was defense counsel that referenced an instruction and Juror 59 had already affirmed he would not give law enforcement testimony more credibility. *See* State v. Enno, 119 Idaho 392, 399 (1991). The entirety of voir dire establishes Juror 59 was not actually biased because he repeatedly affirmed he would not give law enforcement witnesses more credibility. "[T]he court is entitled to rely on assurances from venire persons concerning partiality or bias." State v. Hairston, 133 Idaho 496, 506 (1999).

The same is true regarding Juror 59's comments about imposition of the death penalty for the murder of children that Abdullah contends violates the dictates of Morgan v. Illinois, 504 U.S. 719, 729 (1992) (Brief, p.15), which bars a "prospective juror who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions of law." Juror 59 explained his views regarding imposition of the death penalty would not prevent him from imposing a fixed life sentence. (Tr., Vol.II, pp.848-50, 862-63.) Merely because Juror 59 recognized child victims are "one of the best arguments for the death penalty" (id., pp.866-67) does not mean he would automatically vote for death because child victims were involved.

Abdullah has not argued the error "plainly exists." In State v. Adams, 147 Idaho 857, 861 (Ct. App. 2009), the court recognized it should be "particularly careful in applying the fundamental error doctrine to what may be a matter of legitimate strategic or tactical choices by defense counsel" and that "[d]ecisions whether to challenge a potential juror for cause fall within that category." "In assessing whether to challenge a particular juror, attorneys must not only weigh the perceived negative features against the favorable features of that particular juror, they must also consider whether eliminating the juror could result in an even less acceptable individual moving into that position on the jury panel." Id. Similar to Adams, counsels' failure to challenge Juror 59 "may have been a tactical decision . . . because although [Juror 59] gave

some problematical answers in voir dire, other factors may have led defense counsel to believe that [he] was, on balance, a person that [they] wanted on the jury or that [he] was more acceptable than another who might be substituted for [him]." Id. While the state does not believe Juror 59 gave "problematical answers," Abdullah's failure to establish counsel did not have a tactical decision to retain Juror 59 jettisons his claim.[8]

Finally, Abdullah has not attempted to argue he has met his burden of establishing the alleged error was not harmless, but merely contends, "Such error can never be deemed harmless." (Brief, p.19.) While that may be true if the issue is preserved for appeal, it is not true under Perry's third prong and must be rejected. Because Abdullah has failed to meet all three Perry prongs, his claim regarding Juror 59 fails.

Abdullah's claim regarding Juror 83 is also based upon Morgan, *supra*, and fails for the same reasons. (Brief, pp.17-18.) Irrespective of the contents of Juror 83's questionnaire, which is not part of the record on appeal, Abdullah has failed to establish a Morgan violation because Juror 83 explained he would not automatically impose the death penalty. As explained in Morgan, 504 U.S. at 729, a juror may only be excused for cause if he "maintains such views" regarding automatic imposition of the death penalty. During voir dire, Juror 83 recognized the jury was not "required to impose a death penalty in all first degree murder cases," agreed he was "willing to consider not imposing the death penalty," and conceded he was not "of the opinion that death is the only appropriate penalty for murder in the first degree." (Tr., Vol.III, p.324.) Juror 83 "absolutely" agreed he would weigh the aggravating and mitigating circumstances,

[8] This claim was raised in post-conviction, which the district court rejected, concluding "counsel credibly explained their reasoning for keeping this juror ... including identifying that this juror was intelligent and would not be pushed around." (UPCPA, R., p.8463.) While the testimony and court's finding should not be considered on a direct appeal issue, it reaffirms Abdullah has not established the alleged error "plainly exists."

listen to the arguments of counsel, and apply the law as instructed by the district court in deciding whether to impose the death penalty, and that his views would not "prevent or substantially impair [him] from following the Court's instructions." (Id.)

Abdullah's failure to acknowledge the entirety of Juror 83's answers during voir dire illustrates a misunderstanding of Morgan. In U.S. v. Mitchell, 502 F.3d 931, 955 (9th Cir. 2007), the court addressed a juror's response to a question "indicat[ing] that she thought the only punishment for certain kinds of 'horrific crimes should be death,'" but later "qualified . . . by indicating, 'well, death or imprisonment.' Thereafter she said in a number of ways that she could keep an open mind." Similarly, in Treesh v. Bagley, 612 F.3d 424, 438 (6th Cir. 2010) (quoting Morgan, 504 U.S. at 729), the court recognized that cause could be established only if the juror "'will automatically vote for the death penalty in every case'" because such jurors "'will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require.'" Although a juror initially stated she thought anyone guilty of murder should not be "up and walking around," her other responses indicated "she did not believe that everyone who purposely murdered should be sentenced to death." Id. Reviewing all of the juror's statements, the court concluded, "These statements suggest that [the juror] would not 'automatically vote for the death penalty in every case,' and demonstrates that she could take into consideration mitigating factors." Id. at 438-39. As explained in Bowling v. Parker, 344 F.3d 487, 520 (6th Cir. 2003), a juror's equivocal answers about imposition of the death penalty do not establish a vote for "automatic" imposition of the death penalty. This basic principle follows the general rule that the trial judge is permitted to resolve ambiguous and contradictory answers from jurors in determining juror bias. As explained in Patton v. Young, 467 U.S. 1025, 1038-39 (1984), when jurors' answers are ambiguous and contradictory, which is not unusual, "it

is [the] judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading [questions]." This determination "is essentially one of credibility, and therefore largely one of demeanor." Id. at 1039. Because Abdullah has failed to establish Juror 83 would automatically vote for the death penalty, he has not established a constitutional violation as required under Perry's first prong.

For the same reasons he has failed to meet Perry's second prong with regard to Juror 59, he has failed to meet it with regard to Juror 83.[9] Because Abdullah has failed to establish counsel did not have a tactical reason for keeping Juror 83, the alleged error is not "plain" and fails under the second prong. Abdullah has not attempted to argue the error was not harmless. Because Abdullah has failed to meet all three Perry prongs, his claim regarding Juror 83 fails.

III.
Abdullah Has Failed To Establish There Was Insufficient Evidence To Support The Six Crimes For Which He Was Convicted

A. Introduction

Abdullah contends there is insufficient evidence to support his six convictions. (Brief, pp.19-29.) His claims are based upon misrepresentations of the evidence and fail to apply the correct standards involving sufficiency of the evidence claims on appeal.

B. Standard Of Review

"The only inquiry for this Court is whether there is substantial evidence upon which a reasonable jury could have found that the State met its burden of proving the essential elements

[9] This claim was also rejected in post-conviction because the district court credited counsel's testimony that the juror was "kind-hearted, open minded to different people, and different cultures" based upon "the fact the juror told them refugees from Afghanistan, Africa and Iran attended his church and his daughter was a missionary to Africa," which counsel "thought would make this a good defense juror given the facts of this case." (UPCPA, R., p.8465.)

of [the crime] beyond a reasonable doubt," which requires the Court to determine whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" State v. Adamcik, 152 Idaho 445, 460 (2012) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original)). "In conducting this analysis, the Court is required to consider the evidence in the light most favorable to the State, and we do not substitute our judgment for that of the jury on issues of witness credibility, weight of the evidence, or reasonable inferences to be drawn from the evidence," id., even if the evidence is conflicting, State v. Porter, 130 Idaho 772, 787 (1997), or circumstantial, State v. Sheahan, 139 Idaho 267, 286 (2003).

C. There Was Sufficient Evidence For First-Degree Murder

To convict Abdullah of Angie's first-degree murder, the state was required to prove beyond a reasonable doubt that he acted willfully, deliberately, and with malice aforethought and premeditation. State v. Severson, 147 Idaho 694, 712 (2009).

Abdullah contends, because the state's "theory of Angie's cause of death" and the evidence supporting the state's theory allegedly required a combination of both Prozac poisoning and suffocation, the state was required to prove both, and since "[t]here is no evidence, let alone substantial evidence, linking [him] to the Prozac," the conviction was not supported by substantial evidence. (Brief, pp.19-22.) Abdullah's contention is legally wrong and the state provided substantial evidence "linking [him] to the Prozac."

The Amended Indictment asserted Abdullah murdered Angie "by suffocating her and/or by acute Prozac (fluoxetine) poisoning." (R., p.710.) The jury instruction explained the state was required to prove beyond a reasonable doubt that Abdullah "engaged in conduct which caused the death of ANGELA ABDULLAH" (R., p.1578, JI 13) (capitalization in original); it did not

require the state to establish an express means of conduct that caused Angie's death. As explained in Severson, 147 Idaho at 713, "the State was not required to prove the specific cause of [Angie's] death, the fact that [Angie] may have died from one or two possible causes did not preclude the jury from finding [Abdullah] guilty of murder." Like Severson, there is "no evidence indicating [Angie] died from natural causes." 147 Idaho at 713. While Dr. Groben initially believed the cause of death was "asphyxiation due to a plastic bag over the head" (Tr., Vol.VI, p.447), after additional testing he concluded the cause of Angie's death was "acute Fluoxetine poisoning associated with asphyxiation due to a bag over the head" (id., p.480).

Because Angie's body was found with a plastic bag over her head, Dr. Groben also considered the possibility of suicide, but determined, "[t]he position of the body at the scene was totally inconsistent with suicide" and he "found no drugs on board at that point in time to suggest [it], and no one places a bag over their head without drugs on board. And there were other things that [he] used that made [him] rule out suicide." (Id., p.448.) While additional testing was completed revealing Angie had a "potentially lethal" amount of Fluoxetine in her body at the time of her death (id., pp.472-73), Dr. Groben never changed his opinion regarding the absence of evidence supporting a suicide theory, but concluded the "manner of death" was still homicide, particularly "because of all of the other circumstances involved in the case" (id., pp.480, 489).

Evidence was presented establishing that, while Angie had issues with depression, she did not have suicidal ideation. Dr. Leslie Petersen-Lundt, Angie's psychiatrist, responded, "[a]bsolutely not," when asked if Angie "was displaying the characteristics of someone who was moving toward self-harm or suicide." (Id., p.773.) Nancy Nadolski, nurse practitioner for Dr. Petersen-Lundt, "saw none" of the "characteristics of someone who's moving toward self-harm." (Id., p.934.) Gina Wolfe Seybold, Angie's therapist, testified, "I never, ever heard Angie make

any statement nor was I aware of any behavior that would indicate that she would hurt herself." (Tr., Vol.VII, p.53.)

In addition to the expert witnesses, several witnesses testified regarding Angie's demeanor on or near October 4. Kim Seewald, S.S.'s mom, saw Angie between September 16 and October 4, and Angie seemed "fine." (Tr., Vol.VI, p.569.) When Kim dropped off S.S. on October 4, she stayed and talked with Angie for over 90 minutes planning a baby shower. (Id., p.570.) Angie appeared "as normal to [Kim] as any other time," looking "fine" without anything "unusual about her demeanor or behavior." (Id., pp.572-73.) Kim explained she would not have permitted S.S. to stay if she had any concerns about Angie. (Id., p.577.) Evelyn Whittington, Angie's mom, testified she saw Angie that same afternoon and there was nothing "unusual" about Angie's demeanor. (Id., pp.591-94.) At a family gathering that night, Angie was "happy," "proud of her new baby," and "fine." (Id., p.595.) Leslie Beck, Angie's cousin, explained Angie "looked happy," was not "overly sad or depressed," "seemed very relaxed and comfortable," and agreed there was nothing "unusual about Angie's [] behavior or her demeanor or her speech or anything like that" at the gathering. (Tr., Vol.IV, pp.145-46.) Charlene Javernick, Angie's aunt, hosted the gathering and explained Angie was "[c]alm, happy to be with family, visited easily," "seem[ed] like she was enjoying herself," was not "moody" or "irritable," and Angie's interaction with others at the gathering was "absolutely normal." (Tr., Vol.VI, pp.584-85.)

While "[t]he evidence produced at trial revealed that it was unlikely that [Angie's] overdose was self imposed, [] there was substantial evidence linking [Abdullah] to [Angie's] murder." Severson, 147 Idaho at 714 (footnote omitted). Abdullah's argument centers on his belief that the timeline for administering Angie Fluoxetine is inconsistent with him being seen by Wood in Mountain Home at midnight. (Brief, pp.21-22.) Admittedly, Dr. Edward Barbieri

opined Fluoxetine did not kill Angie, but was a contributing factor because it could have debilitated Angie. (Tr., Vol.VI, p.870.) Relying upon Dr. Groben's autopsy report, Dr. Barbieri opined Angie's stomach contents revealed she ate approximately 90 minutes prior to her death and the Fluoxetine had to be taken prior to eating that meal because it would have taken between 30 and 100 capsules to reach the level of toxicity found in Angie's body. (Id., pp.864-67.) Because the capsules are made of a gelatin coating, a "mass of gelatinous material" would have been found in the stomach contents, which was not in Dr. Groben's autopsy report, resulting in Dr. Barbieri opining the autopsy report was inconsistent with the assumption that the Fluoxetine would have been taken between 10 p.m. and midnight. (Id., pp.864-67.) However, Dr. Barbieri agreed the capsules "can be easily cut and pulled apart," "emptied into a liquid, and its bitter taste "mask[ed] or disguise[d]" by a "sweetener or sugar," which was a possible means of administering the acute dosage to Angie. (Id., pp.868-69.) Dr. Ronald Backer explained, "in an 8-ounce glass of fluid, you could have more than would be necessary to ingest" the necessary toxic level of Fluoxetine. (Id., p.550.) Abdullah's contention that there was "undisputed testimony from the State's experts [that] reflect Angie ingested the Prozac sometime between 10 p.m. and midnight" (Brief, p.21) is a mischaracterization of the testimony and the reasonable inferences that can be derived therefrom. Based upon the lack of evidence supporting a suicide theory, it was reasonable for the jury to infer Abdullah gave Angie the Fluoxetine mixed with a sweetener in an unknown fluid resulting in there being no gelatinous material in her stomach and incapacitating her such that he could put the bag over her head causing her to suffocate.

The additional evidence proving Abdullah's guilt and his motive for murdering Angie also establishes the state's theory and that the inference found by the jury was much more than "rank speculation backed by no evidence." (Brief, p.22.) At the time Abdullah murdered Angie,

their marriage was in such disarray that she contacted an attorney, Debra Kristal, on September 9, to discuss divorcing Abdullah. (Tr., Vol.VI, pp.711-18.) Angie was concerned about the financial status of the family and what would happen if she obtained a divorce because Abdullah "wasn't good with money, he wasn't trustworthy with money." (Id., pp.711-12.) They discussed Angie's personal assets, including the house Abdullah had listed for sale, even though the title was only in her name, and who would have to vacate the house if Angie filed for divorce. (Id., pp.713-14.) Abdullah wanted to move to either Saudi Arabia or South Africa and Angie was "not interested in moving." (Id., pp.714-15.) Angie explained Abdullah was not a "nice man," was "very controlling and he can't be trusted," and had an affair with two girls when she was pregnant with N.A. (Id., p.717.) Angie was so concerned about the situation that she wasn't sure she could go home that night and explained she could stay with a girlfriend. (Id., pp.718-19.) Based upon a letter written by Angie to Abdullah, he was clearly aware of her discontent. (Id., Vol.VII, pp.502-04; Exhibit 144B.)

An analysis of the Abdullahs' financial status at the time of Angie's murder established they were "pretty much living month to month" and "borrowing to make ends meet." (Id., Vol.VII, pp.248-49.) On August 21, Abdullah purchased a fire insurance policy for the vending machines that applied only if the machines were at the house and did not cover theft or other damage to the machines (id., pp.317-336), which "seemed odd" to the agent (id., pp.347, 350). As a result of the marriage, Abdullah was also named on Angie's insurance policy that covered her home. (Id., p.357.) In June, Abdullah's co-worker, Meghan Watters, sent an e-mail offering to purchase household items. (Id., pp.40-41.) Abdullah contacted Watters offering to sell "[e]verything. Lawnmower, he said washer/dryer," "everything in the house." (Id., p.41.)

During the summer of 2002, Abdullah told co-workers, "it's okay to kill your wife ... if she was unfaithful -- as long as you explain to her parents, you know, why and made them an offering." (Id., p.110.) Another co-worker confirmed the statement, explaining, "At that time [Abdullah] mentioned in his country it was an acceptable practice to murder or have your wife murdered if she did commit adultery." (Id., p.311.) In a separate statement to another co-worker, Abdullah indicated, "divorce was extremely frowned upon in Islam, and that it just doesn't happen." (Tr., Vol.VI, p.392.)

On October 3, Abdullah made a purchase at the India Emporium that was placed in a plastic bag. (Id., pp.391-92.) An identical bag was obtained from the India Emporium (id., pp.903-06; Exhibit 30) that appeared to be the same type recovered from Angie's head at the time of the autopsy (id., pp.419-26; Exhibit 34). Fluoxetine was the other means of murdering Angie, and it was reasonable for the jury to infer Abdullah knew of her use of Fluoxetine because they lived in the same house, were married for several years, and her health insurance was through his job. (Id., p.306; Exhibit C-5.)

On October 4, at 10:03, Abdullah commenced his trip to Salt Lake by purchasing gas at a Chevron station in Boise. (Tr., Vol.V, p.21; Exhibit 22.) R.A. accompanied him on the trip (Tr., Vol.IV, p.44) even though Abdullah wanted to take N.A., his favorite son (Tr., Vol.VI, pp.389-93). The alleged purpose of the trip was to purchase "Halal," a meat prepared for Muslims that was not available in Boise. (Tr., Vol.IV, pp.44-45; Vol.V, p.163.) Despite twice going to the store that sold it, Abdullah never purchased any meat. (Id., pp.280-89; Exhibit 51.) Abdullah told several people of the upcoming trip. (Tr., Vol.IV, pp.451-53; Vol.VI, pp.392-93; Vol.VII, p.81) In fact, a neighbor saw Abdullah at the Chevron station and Abdullah paid for the neighbor's gas, which the neighbor thought was "a little strange." (Tr., Vol.IV, p.453.)

When questioned by police, Abdullah described what he did in Salt Lake, contending he was there from the time he left Boise on October 4, until he returned the evening of October 5 on an airplane. (Tr. Vol.IV, pp.509-13; Exhibit 19A and C.) While many of Abdullah's daylight activities were corroborated, there was no evidence establishing he was in Salt Lake from 8:08 p.m. on October 4, until 7:00 a.m. on October 5 (Tr., Vol.V., pp.28-29) when he met with Din (id., pp.134-36). Driving from Salt Lake to Boise at 75-80 miles per hour took approximately 4½ hours. (Id., p.654.) Abdullah's alleged night activities could not be corroborated because he was traveling back to Boise as established by Wood who was working in Mountain Home just off I-84 about midnight when Abdullah purchased soda. (Tr., Vol. VI, pp.956-60.)[10] Moreover, Abdullah failed to mention some of his activities in Salt Lake, including purchasing a Halloween cape and mask and two gas cans. (Id., pp.512-13.) Davis described selling Abdullah the cape and mask (Tr., Vol.V, pp.71-79; Exhibit 25), which was corroborated by a merchant's receipt signed by Abdullah (id., pp.71-74; Exhibit 57) and a customer's receipt found in Abdullah's wallet (id., pp.17-18; Exhibit 22). Despite Davis' identification and the receipts, during a recorded phone conversation with Din on October 17, Abdullah denied any knowledge of purchasing a cape or mask. (Tr., Vol.V, pp.153-55; Exhibit 76A, pp.12-14.) Ba could think of no reason why a Muslim would purchase an adult-sized Halloween cape because Muslims do not celebrate Halloween, "practice trick-or-treating or dress[] in costumes on Halloween." (Tr., Vol.IV, pp.341-42.) Ba's testimony was corroborated by Din. (Tr., Vol.V, pp.152-53.) S.S. confirmed the family was not permitted to celebrate Halloween. (Id., pp.74-75.)

[10] An Officer interviewed Wood on October 11, 2002, and testified Wood was shown a photo of Abdullah and "within two or three seconds she stated that this guy had been in the store last Friday night, early Saturday morning." (Tr., Vol.VI, pp.901-02.) Wood was not provided any information regarding the "time or date details" surrounding the investigation prior to being shown the photo and making her spontaneous statement. (Id.)

The cape was not recovered from Abdullah's van (Vol.IV, p.716), because it was found at the fire scene (id., pp.283, 321); the mask was never recovered. The cape was subsequently tested for DNA and Abdullah could not be excluded as a "minor contributor" on the "preps" from the cape, which were consistent with a mixture of DNA from more than two individuals. (Tr., Vol.VI, pp.1012-13.) Using a Middle Eastern database, the DNA expert explained, "The probability of randomly selecting an unrelated individual with the DNA profile consistent with the reportable DNA profile from the cape prep is 1 in 16,000," which is less than ten people in Boise with a population of approximately 150,000. (Id., p.1017.)[11]

The surveillance tape from Food 4 Less established Abdullah and R.A. purchased two red gas cans (id., pp.209-10, 408-14; Exhibit 49), which was corroborated by a customer receipt in Abdullah's wallet (id., pp.19-20; Exhibit 22), and a journal tape from the store (id., pp.184-88; Exhibit 88). A partially melted red gas can was recovered from the driveway at the time of the fire. (Tr., Vol.IV, pp.270-71; Exhibit 13.) Abdullah contacted Ba, asking him to contact Din to engage in conduct facilitating Abdullah's lie to the police regarding the gas cans he purchased in Salt Lake; Ba refused as "a matter of principle." (Id., pp.334-38.) When Ba refused to facilitate Abdullah's lie, Abdullah had a telephone conversation with Din asking him to purchase two cans of gas, empty the gas, and then leave the containers in Abdullah's van. (Tr., Vol.V, pp.145-46.) Din refused to facilitate Abdullah's lie because "things didn't match." (Id., p.147.) The gas can found at the scene was tested for DNA, but based on the "little information" obtained from the testing, the only result was that Abdullah "could not be excluded as a minor contributor" of preps one and two on the gas handle. (Tr., Vol.VI, pp.1008-09.)

[11] Prior to trial, the expert utilized only African American, Caucasian, and Hispanic data bases; the Middle Eastern database was not utilized until the day before the expert testified. (Tr., Vol.VI, p.1015.) The odds of a random selection are less in the Middle Eastern database than the other three databases. (Id., p.1016.)

Abdullah was last seen in Salt Lake at 8:10 p.m. when he purchased 22.581 gallons of gas at a 7-11 store. (Tr., Vol.V, pp.375-79; Exhibit 47.) However, the maximum capacity for the gas tank in Abdullah's van was "a bit over 21 gallons," which was established by removing the tank from the van, draining it, and then starting the van and letting it idle until it stopped (Tr., Vol.VI, pp.748-54), permitting the jury to infer that less than 21 gallons of gas was required to "fill" the van when Abdullah left Salt Lake since most motorists do not remove the gas tank, drain it, and allow the vehicle to idle until it stops. Additionally, a sample was taken from the gas can recovered at the scene and tested by Dr. William Colucci who explained a sample taken from the Salt Lake 7-11 contained the same gasoline additive – High Tech 6423 – as the sample taken from the can that was not present in control samples from Chevron. (Tr., Vol.VI, pp.680-87.) The samples from 7-11 and the can also contained a "fuel component" that prevented Dr. Colucci from determining the "lowest additive concentration," which is the "lowest treat rate that -- treat rate is the concentration in the gasoline -- that is allowable by law" (id., pp.682-86), which told him there was something "unique about the fuel that was produced" (id., p.696).

On October 5, at 11:36 a.m., Abdullah purchased 16 gallons of gas at a Maverick in Salt Lake. (Tr., Vol.V, pp.103-09; Exhibits 28, 40.) The receipt from the transaction was signed by Abdullah (Exhibit 28), and while the clerk could not identify Abdullah, the clerk testified the customer was accompanied by a small child. (Tr., Vol.V, p.108.) There was no explanation for Abdullah's use of 16 gallons of gas since his purchase the night before at 7-11 if he stayed in Salt Lake that night. After purchasing the gas, Abdullah bought a pair of sandals (Exhibit 54), permitting the jury to infer he purchased the sandals because his shoes were tainted with gas.

Finally, evidence established Abdullah was burned during the course of the fire. Detectives were asked to collect hair samples from Abdullah and while looking at his left arm,

they noticed "uneven hair growth." (Tr., Vol.VII, p.183.) Abdullah spontaneously stated, "I shaved there." (Id.) Detective Greg Morgan opined the area was not consistent with having been "shaved," but "appeared to be a healing-type wound with scabs on it. It appeared ... the hair may have been singed." (Id., p.184.) Various hair samples taken from Abdullah were microscopically examined by forensic scientist Dave Laycock, resulting in a determination that at least six tested hairs – three from each arm – were "exposed to high heat," meaning a "minimum of 175 degrees Centigrade" or 347 degrees Fahrenheit, "a little less than twice the boiling point of water." (Id., pp.274-78, 296.)

Angie did not die from suicide. While there may be conflicting evidence regarding the exact cause of her death, the law does not require the state to establish the exact cause of death, let alone both potential causes of death. Severson, 147 Idaho at 713. When all of the evidence is considered in a light most favorable to the state, Abdullah has failed to establish that no rational juror could not have found all of the essential elements of first-degree murder.

D. There Was Sufficient Evidence For First-Degree Arson

Abdullah does not deny he put all of the events in place for the house to burn by pouring the gas in the garage and throughout the house, but contends that, because the pilot light from the water heater or furnace prematurely ignited fumes in the garage before he could actually light the gas himself, he is only guilty of attempted first degree arson. (Brief, pp.22-25.) Abdullah's argument misconstrues the plain language of the statute and is merely an attempt to argue that ignition of the fire from a pilot light is an intervening cause that absolves him of criminal liability under I.C. § 18-802, resulting in nothing more than attempted arson under I.C. § 18-306.

To convict Abdullah of first-degree arson, the state was required to prove beyond a reasonable doubt that he "willfully and unlawfully, by fire or explosion, damage[d]" "[a]ny

dwelling." I.C. § 18-802(1); (R., 1578, JI 20). "Willfully" merely requires "a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." I.C. § 18-101(1). "Attempt consists of (1) an intent to do an act ... which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." State v. Fabeny, 132 Idaho 917, 923 (Ct. App. 1999).

Lance Hart, a certified fire investigator for the Bureau of Alcohol, Tobacco & Firearms, investigated the fire and concluded, "The area of origin is the garage" with "two potential ignition sources. We had the ignition source of the water heater and we had the ignition source of the gas furnace." (Tr., Vol.VI, p.197.) Hart opined the water heater was the lowest ignition source and caused premature ignition of the fuel-air mixture in the garage that was caused by the deliberate introduction of gas in the garage. (Id., pp.197-201.) The fuel-air mixture was created by pouring gas "all over the cardboard" covering the vending machines." (Id., pp.203-04.) The fire progressed to the attic and roof into the family room and kitchen, eventually igniting a gas-air mixture in the living room created by more gas "pours" that were intentionally placed in strategic locations throughout the house. (Id., pp.205-08.) Hart opined, "the individual was inside the home and had not ignited -- based upon the totality of the circumstances and eye witnesses' observations, that the individual was in the home and fled the home when this event occurred here. This was a premature ignition." (Id., p.208.) Hart explained:

> [I]t's premature because ... the gasoline was deliberately poured and it was intended to be ignited by human hand. And the fact that we had gasoline that was being poured elsewhere in the house, I believe that was the place where the gasoline was poured first. It was able to diffuse with the atmosphere in the garage, reach a flammable range, and then become exposed to that ignition source, the water heater.

> Typically, a person who is deliberately going to set a fire would not rely upon an accidental or an ignition source that was present. They would not take that chance. They would initiate the fire on their own by connecting a trailer to that fire.
>
> ****
>
> It was a competent ignition source that the person who poured the gasoline to start this fire, I believe, had not intended for that water heater to be the triggering or the ignition device.

(Id., p.234.) While the fire involved premature ignition, Hart explained "the fire was classified as incendiary, meaning that was a deliberately set fire ... [b]y a human being," and "eliminate[d] accidental causes" and "weather and accidental electrical causes." (Id., pp.213-14.)

The evidence presented demonstrates Abdullah intended to destroy the house by fire or explosion and his acts went far beyond "mere preparation." Indeed, but for the intervening spark caused by the pilot light, nothing more was required than "lighting the match" to complete Abdullah's intended goal. However, such an intervening cause does not absolve Abdullah of criminal liability under I.C. § 18-802. "To relieve a defendant of criminal liability, an intervening cause must be an unforeseeable and extraordinary occurrence. The defendant remains criminally liable if either the possible consequence might reasonably have been contemplated or the defendant should have foreseen the possibility of the kind that could result from his act." People v. Crew, 74 P.3d 820, 847 (Cal. 2003) (*cited with approval*, State v. Lampien, 148 Idaho 367, 374-75 (2009)).

In People v. Bowman, 669 P.2d 1369, 1373, 1378-79 (Colo. 1983) (footnote omitted), the defendant contended the evidence was insufficient because the only expert testimony on the manner of ignition established a pilot light from a space heater ignited flammable fumes from gas that had been poured on furniture and the floor, which started the fire resulting in a "supervening cause breaking the chain of causation." The court concluded the law of causation

adopted in a prior homicide case also applied in an arson case where the evidence presents a question of supervening causes. Id. at 1379.

Abdullah's argument regarding the 1993 changes to the arson statutes does not negate the law regarding intervening causes or provide him any basis for relief. While fourth-degree arson was defined as attempted arson prior to 1993, I.C. § 18-804 (1972), and the statute was repealed, in part, because attempted criminal acts were covered by other areas in the law, Statement of Purpose, RS 02437 C1, HB 251 (1993), there is nothing establishing I.C. § 18-306 embraces all of the language from I.C. § 18-804 (1972), or that the statute's repeal limits prosecution to mere "attempts" under the facts of this case. Rather, it was the intent of the Legislature to broaden Idaho's arson statutes by providing definitions that permit the charging of arson, "not only in cases involving a charring or burning, but also, in any circumstance in which there has been any damage to property as a result of fire or explosion." 1993 Idaho Sess. Laws, ch. 107, pp.273-74.

Abdullah's criminal conduct should not be rewarded merely because the pilot light intervened and ignited the gas fumes before he could light the match. His soaking the cardboard surrounding the vending machines and pouring gas throughout the house in strategic locations was *fait accompli*.

E. There Was Sufficient Evidence For Attempted First-Degree Murder

Abdullah's only argument regarding all three attempted first-degree murder convictions is that the state failed to prove specific intent because he was only "attempting to commit arson at the time of the accidental ignition of gasoline vapors in the garage" and, irrespective of whether he intended to commit arson, "there is no evidence to support the conclusion [he] intended to kill or injure" the three children. (Brief, p.27) (emphasis omitted).

"[A]ll attempts are specific intent crimes. Specific intent is a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the completed crime." State v. Carlson, 134 Idaho 389, 79-80 (Ct. App. 2000) (quotes, citation, and emphasis omitted). "Specific intent may, and ordinarily must, be proved by circumstantial evidence," State v. Oldham, 92 Idaho 124, 132 (1968), and "is manifested by the commission of the acts and surrounding circumstances connected with the offense," I.C. § 18-114.

In the previous section, the state explained why Abdullah's actions were more than an "attempted arson." Further, the issue of N.A. being found outside supports the convictions for attempted first-degree murder of the other three children because N.A. was Abdullah's "favorite son" (Tr., Vol.VI, pp.389-93), which is why Abdullah removed him from the house prior to it being consumed by the fire. It is reasonable to infer N.A. was removed from the house well before the fire even started because "he did not have any smoke or soot or any signs of being in a fire on his body" at the time he was rescued from the backyard. (Tr., Vol.IV, p.371.) While Abdullah reaches a different inference (Brief, pp.27-28), this Court is not permitted to substitute its judgment regarding reasonable inferences found by the jury. Porter, 130 Idaho at 787.

Additionally, it was reasonable for the jury to infer specific intent because Abdullah was willing to "rescue" his favorite son prior to rescuing his infant son, M.A., who was in the same bedroom and had absolutely no chance to escape the fire absent the heroic efforts of neighbors. The same is true with respect to A.H. and S.S.; Abdullah could have merely yelled at them or awakened them on his way out of the house if he truly did not intend their deaths. Further, Abdullah admitted during an interview with insurance investigator Michael Jones that he knew S.S. would be at the home on the night of the fire. (Tr., Vol.VI, pp.248-49; Exhibit 106C, p.36.)

Abdullah's acts and the circumstances connected with the arson permitted the jury to infer he intended all three children to die in the fire he started by soaking the cardboard around the vending machines and pouring gas in strategic locations throughout the house.

F. There Was Sufficient Evidence For Felony Injury To Child

A charge of felony injury to child required the state to prove that Abdullah, "under circumstances or conditions likely to produce great bodily harm or death,... willfully cause[d] or permit[ted] [N.A.] to be placed in such a situation that [his] person or health [was] endangered." I.C. § 18-1501.

Firefighter Brandon Rentz described returning to the backyard where he and fellow firefighters had "been standing a couple minutes prior." (Tr., Vol.IV, p.365.) Rentz explained he was "walking back looking for [his] partner" and saw "this blanket laying out with a potted plant on it and a couple toys" he believed were stuffed animals with "a child just sitting there kind of just looking at me. He wasn't alarmed. He ... was just looking at me." (Id., p.366.) Rentz wondered how the child had gotten there in such a short time (id.), which was "a couple minutes at the most" (id., p.371). Rentz did not believe the child could have carried the blanket himself, and the child "did not have any smoke or soot or any signs of being in a fire on his body." (Id.) Nevertheless, Rentz believed the child was "at risk," [b]ecause of the intense fire load, this -- I'd estimate 75, 80 percent of the structure was fully involved, the roof was nearly collapsed at this point and there's fire blowing out of each window. And just like a bonfire, we felt that heat before us. It is a radiant heat glowing out of the windows. If he sat there long enough, that child would have been burned." (Id., p.372.)

Abdullah does not dispute the facts surrounding N.A. being found by a firefighter in the backyard of the burning house conceding they are "undisputed," but contends there is

insufficient evidence to support his conviction for felony injury to child because the "reasonable inference" from the evidence is that N.A. "was moved to a position of relative safety" "where he would be found by firefighters." (Brief, pp.28-29.)[12] Based upon the evidence and the jury's verdict, there is another inference that is just as "reasonable" – Abdullah, under circumstances likely to produce great bodily harm or death, placed N.A. in a situation that may have endangered his person or health by leaving him in the backyard next to a house that was 75-80 percent engulfed in fire with fire coming out the windows and a roof ready to collapse at any second. The state was not required to prove specific intent to harm N.A., death or even immediate harm, but merely that Abdullah permitted N.A. to be placed in a situation that he knew would endanger N.A.'s health. "[A]lthough the evidence presented may have been susceptible to reasonable inferences of both guilt and innocence, the jury had the ability to decide what inferences to draw." State v. McNeil, 2013 WL 5952023, *5 (Ct. App. 2013). Based upon he "undisputed" evidence, not substituting this Court's judgment on reasonable inferences found by the jury, and viewing the evidence in a light most favorable to the state, Abdullah has failed to establish there was insufficient evidence to sustain the jury's verdict on felony injury to child because the "jury's verdict was not without a basis in fact or reason." State v. Merwin, 131 Idaho 642, 645 (Ct. App. 1998).

IV.
Abdullah Has Failed To Meet His Burden Of Establishing Fundamental Error With Regard To His Jury Instruction Claims

A. Introduction

Abdullah contends the jury was not properly instructed because the only definition of "willful" was provided in response to a jury question regarding the definition of "willful" in the

[12] The state notes Abdullah has failed to support his argument with any authority, which should prevent this Court from even addressing the claim. Zichko, 129 Idaho at 263.

elements instruction for first-degree arson. (Brief, pp.29-39.) While he analyzes this issue with respect to the other three crimes for which he was convicted, the issue is the same: whether the jury was properly instructed when the court provided no other instruction regarding the term "willful" except the definition provided with respect to the jury's specific question regarding the elements of first-degree arson. Because Abdullah is raising this issue for the first time on appeal, it must be reviewed under fundamental error, which he has failed to establish.[13]

B. Standard Of Review

Whether jury instructions fairly and adequately present the issues and state the applicable law is a question of law over which this Court exercises free review." State v. Shackelford, 150 Idaho 355, 600 (2010) (quote and citation omitted).

C. Abdullah Has Failed To Establish Fundamental Error

Jury instructions given without an objection are reviewed under Perry fundamental error. Adamcik, 152 Idaho at 472-74. An erroneous instruction rises to the level of a constitutional violation only where "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Jones v. U.S., 527 U.S. 373, 390 (1999) (quotes and citation omitted). An instruction reducing the state's burden of proof violates the right to a jury trial because such an error "vitiates *all* the jury's factual findings." Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (emphasis in original). Removing from the jury a decision on elements of the crime can also implicate the constitutional right to a jury. Morissette v. U.S., 342 U.S. 246, 275 (1952). However, instructions must be reviewed "as a whole, not individually, to determine whether the jury was properly and adequately instructed."

[13] During post-conviction proceedings, it was learned guilt-phase instructions were emailed to the court by Toryanskis. (UPCPA, Tr., pp.209-10.) Those proposed instructions are not part of the record they were not considered during post-conviction proceedings. (UPCPA, R., p.8200.)

Shackelford, 150 Idaho at 600-01. "In evaluating the instructions, we do not engage in a technical parsing of [the] language of the instructions, but instead approach the instructions in the same way that the jury would – with a commonsense understanding of the instructions in the light of all that has taken place at the trial." Johnson v. Texas, 509 U.S. 350, 367 (1993) (quotes and citation omitted).

Instructing on the elements of first-degree murder, the district court first gave ICJI 704A (except for element six), which defines the elements of murder (R., p.1578, JI 13.)[14] The court also instructed, "Murder is the killing of a human being without legal justification or excuse and with malice aforethought. The killing of a human being is unlawful when it is not legally justified or excused. In this case there is no claim of legal justification or excuse." (Id., JI 14.) Defining "malice," the court instructed, "It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart, which means a condition of heart and mind which has no regard for social or moral obligation." (Id., JI 15.) The court also instructed, "The term 'aforethought' means that the required mental state must come before, not after, the act. It does not necessarily mean deliberation or the lapse of considerable time. Malice aforethought does not necessarily require any ill will or hatred toward the person killed." (Id.) The court then gave the rest of ICJI 704A (element six), which defines first-degree murder as "a willful, deliberate and premeditated killing." (Id., JI 16.) While the court defined "premeditation," no instruction was given for "willful" or "deliberate." (Id.)

[14] Abdullah notes the court did not delete the phrase, "the Defendant acted without justification or excuse (Brief, p.32 n.2.) Because he provided no authority or argument establishing the alleged error was prejudicial, it has been waived and will not be further addressed by the state. *See* Zichko, 129 Idaho at 263.

Abdullah initially contends that under State v. Aragon, 107 Idaho 358, 362 (1984), the jury should have been instructed that "willful" required the state to show he "manifested a clear intent to take life." (Brief, p.33.) This argument was rejected in State v. Draper, 151 Idaho 576, 589 (2011), when this Court explained willful is a term of "common usage" and "sufficiently generally understood" to "include an intention to commit the particular act" that needs no further definition. While Abdullah notes Draper in a footnote, he continues to assert it was wrongly decided. (Brief, p.34 n.16.) However, raising claims in footnotes does not comply with I.A.R. 35(b)(6). In Idaho Power Co. v. Idaho Dept. of Water Resources, 151 Idaho 266, 278 (2011), this Court declined to address issues raised only in a footnote. *See also* State v. Stover, 126 Idaho 258, 264 n.3 (Ct. App. 1994) (references to issues in a footnote "without authority or argument will not suffice to present on appeal an issue of ineffective assistance of counsel"). If Abdullah is serious about this issue, it should have been squarely raised in the body of his brief, not as an afterthought in a footnote. Irrespective, Abdullah's argument fails because he has not provided any argument beyond what was presented in Draper, *supra*, and rejected by this Court just two years ago. As explained in State v. Grant, 154 Idaho 281, 287 (2013) (quotes and citation omitted) (emphasis added), "When there is controlling precedent on questions of Idaho law the rule of *stare decisis* dictates that we follow it, unless it is manifestly wrong, unless it has proven **over time** to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice."

Abdullah next contends that, because the only definition of "willful" given was the standard definition from I.C. § 18-101(1) and instructions must be viewed as a whole, it must be presumed the jury applied this definition to every criminal offense for which he was convicted, except first-degree arson. (Brief, pp.29-39.) Because of the unique procedural posture of his

case, Abdullah's claim fails. Although the term "willful" was used throughout the instructions, particularly the elements instructions, no definition was provided. While deliberating, the jury sent the following question, "In instruction No. 20 item #3 can we be given the legal definition of 'willfully.'" (R., Supp. p.69.) After consulting with counsel and pursuant to stipulation (Tr., Vol.VIII, pp.189-91), the court responded to the jury's question by instructing, "An act is 'wilful' [sic] or done wilfully' [sic] when done on purpose. One can act wilfully [sic] without intending to violate the law, to injure another, or to acquire any advantage." (R., Supp. p.70.)

In Brown v. Smith, 137 Idaho 529, 534 (Ct. App. 2002), the defendant was charged with burglary, but the elements instruction did not include a definition of "theft" that was included in a different instruction defining theft by possession of stolen property. The court of appeals concluded there was no prejudice because it is "presumed that the jury followed the only definition of theft they were given." Id. In this case that "presumption" has been rebutted because the willful instruction given was in response to the jury's question regarding only the first-degree arson instruction and "item 3" in that instruction. There is no basis to "presume" the jury applied that same definition to the other elements instructions when it was only given in response to a question regarding only one part of the first-degree arson elements instruction.

However, that same unique procedural posture does not salvage Abdullah's claim regarding the premeditation instruction and felony injury to child. (Brief, p.36.) The district court never instructed that the premeditation definition applied only to first-degree murder, let alone just Angie. Angie's name was not even mentioned in the definition and was only referenced in the first paragraph of the instruction. Because the jury was instructed it must consider the instructions "as a whole, not picking out one and disregarding others" and that the "order in which the instructions are given has no significance as to their relative importance" (R.,

p.1578, JI 4), it must presume the jury properly applied the only instruction given on premeditation. Brown, 137 Idaho at 534.

Abdullah's argument that the jury was not instructed that it had to find he acted with specific intent to kill the children is mistaken, not only because of Draper, *supra*, but because the instructions stated that to be guilty of attempted first-degree murder the state had to prove he "intended to commit [first-degree murder]" and "the murder was willful, deliberate and premeditated." (R., p.1578, JI 21-26.) Abdullah's reliance upon State v. Buckley, 131 Idaho 164, 166-67 (1998), is also misplaced because Abdullah's jury was instructed, "the Defendant, AZAD ABDULLAH did some act which was a step towards committing the crime of Murder in the First Degree of [the children] and [] when doing so the Defendant intended to commit that particular crime." (R., p.1578, JI 21, 23, 25.) In Buckley, 131 Idaho at 605, the only instruction given on specific intent was also joined with malice aforethought. No such instruction was given in Abdullah's case; rather, the jury was instructed that when doing "some act which was a step towards committing the crime of Murder in the First Degree" that act was committed with the intent to commit first-degree murder. (R., p.1578, JI 21, 23, 25.)

But for the first-degree arson instruction on willful, Abdullah concedes, "there would likely be no error." (Brief, p.38.) Because the state concurs and has explained why the unique procedural circumstances surrounding the first-degree arson willful instruction would not have been utilized by the jury as to any of the other crimes charged in the Amended Information, Abdullah's claim fails under Perry's first prong.

Even if Abdullah establishes a constitutional violation based upon the instructions, it is still his burden to establish Perry's second and third prongs. 150 Idaho at 227. "[W]hen the jury received proper instruction on all but one element of an offense, and where the Court concludes

beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." Adamcik, 152 Idaho at 472 (quotes and citation omitted). Because Abdullah failed to object, it is his burden to establish "the alleged error was not harmless." Id. at 473. Abdullah did not defend his case based upon the allegation that his actions were not "willful," rather, he defended on the basis that he committed none of the crimes. Further, as detailed in section III above, because the evidence establishing his guilt is overwhelming, his claim also fails under Perry's third prong.

V.
Abdullah Has Failed To Establish The District Court Erred By Admitting Angie's Statements To Rebut His Contention That She Committed Suicide

A. Introduction

Abdullah contends various statements Angie made that were admitted through several witnesses are irrelevant, inadmissible hearsay, constituted inadmissible character evidence, and were more prejudicial than probative. (Brief, pp.39-46.) Because Abdullah presents argument challenging only the district court's decision that the statements Angie made to her attorney were admissible under the "state of mind" exception pursuant to I.R.E. 803(3), all his other claims are waived. Because Angie's statements to Kristal were admitted to rebut Abdullah's contention that Angie committed suicide, his claim fails, and any alleged error is harmless.

B. Standard Of Review

The admissibility of evidence involves a mixed standard of review. Shackelford, 150 Idaho at 363. "[W]hether the evidence is relevant is a matter of law that is subject to free review" while "review [of] the district court's determination of whether the probative value of the evidence outweighs its prejudicial effect [is] abuse of discretion." Id.

C. The District Court Did Not Err By Admitting Angie's Statements

Abdullah's claims regarding the admissibility of Angie's statements to medical/mental health providers or any other witness besides Kristal, and any other challenge beyond I.R.E. 803(3), are waived because Abdullah has failed to support those claims with argument and authority, Zichko, 129 Idaho at 263, although the analysis is the same for all the witnesses under I.R.E. 803(3).

Throughout the trial, Abdullah contended Angie's death was the result of suicide. Dr. Groben explained he examined whether Angie's death was suicide. (Tr., VI, pp.447-48.) As a result of Abdullah's suicide defense and as detailed in section III(C) above, multiple witnesses testified regarding Angie's demeanor prior to her murder and whether she had suicidal ideation. While Abdullah's attorneys waived opening statement (Tr., Vol.IV, p.36), the district court recognized, "we do have a clear view [] that [counsel] have suggested that suicide was what happened here. That we do have a clear view of [sic] because based on the questioning and the previous statements that have been made prior to this, that suicide is one of their theories" (Tr., Vol.VI, p.808), which counsel conceded, "[t]o the extent that suicide -- the opinion that excluded suicide as a manner of death is something we're going to address because that was the testimony that came from the coroner. We want to also have the opportunity to cast reasonable doubt regarding the exclusion of suicide as a manner of death. To that extent, yes, but to the extent that we're going to prove a suicide ... that's our defense" (id., p.809).

To rebut the suicide defense, not only did the state present witnesses to explain Angie's demeanor prior to her murder and whether she had suicidal ideation, the state also presented Angie's statements to Kristal regarding Angie contemplating divorcing Abdullah and the reasons therefore. (Id., pp.697-744.) Prior to Kristal testifying, the district court heard argument

regarding the admissibility of her testimony. (Tr., Vol.VI, pp.605-12.) While trial counsel conceded, "it could go to her state of mind," he argued Angie's state of mind was not "probative as to whether or not my client did her harm or set the house on fire." (Id., p.611.) Relying upon prior testimony that divorce was not acceptable in the Muslim faith, the court ruled it was "probative to potential motive and to the State's contention that he is in fact the person who did this crime"; the court also conducted a balancing analysis under I.R.E. 403. (Tr., Vol.VI, p.612.)

Angie met with Kristal on September 9, 2002, less than four weeks prior to her murder. (Id., p.698.) At trial, when Kristal began to discuss Angie's statements during the meeting, counsel objected on hearsay grounds. (Id., p.702.) After hearing an offer of proof and additional argument regarding admission of the statements, the district court reasoned Angie's statements were not being offered for the truth, but to establish her state of mind; the court again conducted a Rule 403 analysis. (Id., pp.707-10.) The court then gave a state of mind limiting instruction to the jury. (Id., p.710.)

Idaho Rule of Evidence 803(3) reads as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> . . . .
>
> (3) A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

In Shackelford, 150 Idaho at 364, this Court explained, "Limited circumstances exist in which statements made by a murder victim to a third party are admissible under I.R.E. 803(3)'s state of mind exception to the hearsay rule." Discussing whether such statements are relevant,

the Court reaffirmed "four well-defined categories in which a declarant-victim's state of mind is relevant because of its relationship to the legal theories presented by the parties," which include:

> (1) [W]hen the defendant claims self-defense as justification for the killing; (2) when the defendant seeks to build his defense around the fact that the deceased committed suicide evidence introduced which tends to demonstrate that the victim made statements inconsistent with a design to take his or her own life is relevant; (3) when the defendant claims the killing was accidental; and (4) when a specific "mens rea" is in issue.

Id.

While acknowledging "the defense challenged the State's exclusion of suicide as the manner of Angie's death through cross-examination of State witnesses and during its case through its own witnesses," Abdullah contends Angie's statements were inadmissible because they were offered in the state's case-in-chief and he "did not suggest suicide during the criminal investigation." (Brief, pp.45-46.) In Shackelford, the victim's statements were erroneously admitted because the defendant's statements made during the police investigation "were not sufficient to allow rebuttal of a defense theory of suicide." 150 Idaho at 365-66. However, this Court explained that in determining whether a victim's statements are relevant, it must be determined "whether there was a defense theory of suicide." Id. at 365. Because "[Shackelford] did not present a theory of suicide during the trial itself" and [his] statements during the investigation "were not sufficient to allow rebuttal of a defense theory of suicide," the victim's statements were erroneously admitted. Id. at 365-66. This Court, never limited admission of state of mind testimony to rebuttal evidence and inferred when a defendant presents a suicide theory during the trial, the state may offer state of mind evidence during its case-in-chief and does not have to wait until after the defense presents its case-in-chief. Id. at 366 (the state is permitted to "offer evidence in their case-in-chief or as rebuttal during trial" if a defendant makes statements "during a criminal investigation that would create a theory of defense such that

the State would find it necessary"). Common sense dictates this result because a defendant could cross-examine state witnesses injecting a suicide defense and never present any evidence during the defendant's case-in-chief, thereby precluding admission of relevant and important evidence to show the victim's state of mind was inconsistent with a defense theory of suicide.

Apparently recognizing the futility of his argument, Abdullah contends Angie's statements were "nothing more than prejudicial, inflammatory character evidence having little or no relationship to a state of mind inconsistent with suicide." (Brief, p.46.) While exactly which statements were inconsistent or prejudicial remains a mystery, his contention is simply incorrect. Angie's statements about possibly obtaining a divorce and all the reasons for considering a divorce that are listed in Abdullah's brief (Brief, pp.42-43) are inconsistent with someone contemplating suicide because there would be no need to obtain a divorce if she was going to kill herself within a matter of weeks. Presumably, Abdullah has not discussed how the court abused its discretion under I.R.E. 403 because he cannot show the probative value of Angie's statements was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[15] Angie's statements were probative regarding any inclination she had toward suicide. The alleged prejudice was remote because most of Angie's statements were corroborated by other evidence, particularly the condition of their finances (Tr., Vol.VII, pp.248-49), Abdullah's involvement with her return from Nashville (Vol.III, pp.421-25, 878-79), and his being accepted for religious studies in other countries (Vol.IV, p.350; Vol.V, pp.139-40, 159, 168). Moreover, the court gave an instruction limiting the jury's consideration of the testimony (Tr., Vol.VII, p.709), *see* State v. Goodrich, 97 Idaho 472, 478-79 (1976), which the jury presumably followed, State v. Joy, 155 Idaho 1, 7 (2013).

[15] Because Abdullah has failed to present any argument regarding I.R.E. 403, the issue is waived. Zichko, 129 Idaho 263.

Finally, any alleged error is harmless. "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." I.C.R. 52. "The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [Abdullah] even without the admission of the challenged evidence." State v. Johnson, 148 Idaho 664, 669 (2010); *see also* Perry, 150 Idaho at 227. For the same reasons Angie's statements were not unfairly prejudicial, any error is harmless because it did not affect Abdullah's substantial rights. *See* Shackelford, 150 Idaho at 363, 366. Not only were most of Angie's statements to Kristal corroborated, but, as detailed in section III above, the evidence establishing Abdullah's guilt is overwhelming.

VI.
Abdullah Has Failed To Establish The District Court Erred By Admitting His Statements That In His Home Country It Is Legal To Kill An Unfaithful Wife

A. Introduction

Abdullah contends the district court abused its discretion by admitting testimony regarding a conversation with co-workers where he stated it is legal in Kurdistan to kill an unfaithful wife. (Brief, pp.47-49.) Because Abdullah's statements were properly admitted to establish his state of mind regarding the appropriateness of murdering Angie under certain circumstances, his claim fails, and any alleged error is harmless.

B. Standard Of Review

The admissibility of evidence involves a mixed standard of review as discussed in section V(B) above.

C. The District Court Did Not Err By Admitting Abdullah's Statements

During Edgar Reagles' testimony, the state made an offer of proof regarding statements Abdullah made in the summer of 2002 to Reagles and other co-workers where Abdullah stated, "in Kurdistan it is not illegal to kill your wife if she is, you know, unfaithful to you" (Tr.,

Vol.VII, pp.92-93, 101), but you have to "apologize to her parents and then offer them money or something as ... an offering" (id., p.102); Abdullah made no statements endorsing the policy (id., pp.101-02). The state asserted the statement was probative of Abdullah's "state of mind in regards to the appropriateness of killing your wife in certain circumstances," particularly since he was raised in Kurdistan and made "repeated statements regarding his adherence to cultural values with which he was raised." (Id., p.94.) Although Abdullah conceded there was evidence of "him wanting to adhere to the tenets of Islam" (id., p.98), he contended the evidence was not relevant because "[w]hat they do in Kurdistan I don't think has anything to do with what a young man who was 15 when he came here to this country, graduated from Borah High School, worked for five to seven years in American industry, lives under American laws," and "the prejudice would vastly outweigh the probative value." (Id., pp.93-94.) The district court reasoned the testimony was "relevant because it certainly does go to [] Abdullah's state of mind, especially in the months leading up to what occurred in October." (Id., pp.102-03.) Conducting the relevant weighing under I.R.E. 403, the court opined, "[i]t's a very close question," but explained, "I don't believe that its probative value is substantially outweighed by the danger of unfair prejudice," particularly since Abdullah could "mitigate some of the effect of this statement" through cross-examination. (Id., p.103.) Although the court reversed its weighing analysis (id., p.105), the court reinstated its original ruling, concluding "it is something that is odd for him to pick out in the months leading up to the fire and death of [Angie]" (id., p.106).

When the jury returned, Reagles explained that during the summer of 2002, Abdullah responded to a co-worker's question, "what it's like over there versus here in the United States," by stating, "it was legal to kill your spouse as long as you explained it to ... the daughter's family and then made an offering of some sort, of money or something." (Id., p.108.) On

cross-examination, Reagles noted Abdullah did not state whether he agreed, endorsed, or believed "that's something that should be adopted in America." (Id., p.109.) On re-direct, Reagles clarified the statement, explaining, "it's okay to kill your wife ... if she was unfaithful -- as long as you explain to her parents, you know, why and made them an offering" (id., p.110), but then changed "unfaithful" to "[i]f your wife cheated on you" (id., p.111). During the conversation, Abdullah did not indicate whether Angie had been unfaithful. (Id.) Another co-worker, Rod Adams, also testified that in July or August 2002, they were "just talking about some cultural differences and the subject of adultery was brought up. At that time [Abdullah] mentioned that in his country it was an acceptable practice to murder or have your wife murdered if she did commit adultery." (Id., pp.311-12.) Abdullah did not indicate whether he thought it was a good idea, personally adopted the practice, or thought it should be implemented in the United States. (Id., pp.32-13.)

"Evidence is relevant if it has **any** tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Whether a fact is material is determined by its relationship to the legal theories presented by the parties." State v. Stevens, 146 Idaho 139, 143 (2008) (quotes and citations omitted) (emphasis added). Not only is the statement itself relevant, but when considered in the context of the subject matter of the conversation, it is particularly relevant. It is unfathomable, when considering the vast differences commonly known between Middle Eastern countries and the United States, that when asked about the differences in cultures Abdullah's only response was to explain when a husband can legally kill his wife. The only explanation for such a statement is that as early as July or August, Abdullah was at least contemplating killing Angie. Additionally, based upon Abdullah's failure to abdicate in any form his disagreement

with the practice, the statement was an implied or tacit admission that he subscribed to the practice, *see* Folston v. Allsbrook, 691 F.2d 184, 187 (4th Cir. 1982), and was highly relevant in establishing intent and premeditation.

Neither did the court abuse its discretion when weighing the admissibility of the evidence under I.R.E. 403. The question is not whether the statement was "prejudicial" because "almost all evidence in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant." State v. Leavitt, 116 Idaho 285, 291 (1989). Under I.R.E. 403, "the evidence is only excluded if the probative value is *substantially* outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence." State v. Martin, 118 Idaho 334, 340 n.3 (1990) (emphasis in original). The rule protects only against evidence that is unfairly prejudicial tending to suggest a decision on an improper basis. State v. Floyd, 125 Idaho 651, 654 (Ct. App. 1994). The court understood "it is a matter of discretion for the Court" (Tr., Vol.VII, p.103), admission of Abdullah's statement was "within the outer boundaries of such discretion and consistent[] with any legal standards applicable to specific choices," and the manner in which the court struggled with the decision establishes it was reached "by an exercise of reason." *See* Hedger, 115 Idaho at 600.

For the same reasons Abdullah's statement was not unfairly prejudicial, any alleged error is harmless because it did not affect his substantial rights. *See* Shackelford, 150 Idaho at 363, 366. The state has established, beyond a reasonable doubt, that a rational jury would have convicted Abdullah without admission of his statement. *See* Johnson, 148 Idaho at 669. The statement was not determinative of any issue or element. As detailed in section III above, the evidence establishing Abdullah's guilt is overwhelming.

VII.
Abdullah Has Failed To Establish The District Court Erred By Not Admitting Evidence Regarding Angie's Life Insurance Policy

A. Introduction

Abdullah contends the district court abused its discretion by refusing to admit evidence regarding a life insurance policy Angie obtained before marrying Abdullah. (Brief, pp.49-52.) Abdullah waived this claim. Even if not waived, Abdullah has failed to establish the court erred by refusing to admit the evidence, and any alleged error is harmless.

B. Standard Of Review

The standard of review for admission of evidence is stated in section V(B) above.

C. It Was Not Error To Deny Admission Of The Insurance Policy

This claim is waived because Abdullah has failed to support it with argument **and authority**. Zichko, 129 Idaho at 263. Outside of incorporating the standard of review from another section of his brief, he has failed to cite any authority in support of his argument. Regardless, the claim fails because he has failed to establish the evidence was relevant and that the district court abused its discretion under I.R.E. 403.

Prior to trial, the state filed a Motion in Limine seeking exclusion of evidence regarding Angie's life insurance policy that was purchased in 1997, five years before her murder. (R., pp.1082-83.) Abdullah contended the evidence was relevant because it was purchased "[w]ithin months of the suicide by hanging of [Angie's] third husband" and that by continuing to pay the premiums she "ensured that upon her death, members of her family and not her husband were enriched by nearly half a million dollars." (Id., p.1156.) Abdullah also explained, "[Angie's] material omissions and misrepresentations about her medical history on the insurance applications are relevant to show that she was less than truthful with others with whom she

interacted" and that "it would be unfair to allow the State the opportunity to lay a foundation for admission of the homeowners insurance policy and proceeds as a motive regarding the defendant's intent to commit criminal conduct." (Id.) After hearing argument on the motion (Tr., Vol.III, pp.855-56), the court concluded the evidence was not relevant because Angie was "not testifying in this matter so her credibility is not at issue" and "the bare fact that [Angie] had life insurance for five years does not tend to make it more likely that she committed suicide and there's been no foundation laid to show that that's the case." (Id., p.868.) Addressing I.R.E. 403, the court explained, "this minimal probative value is far outweighed of [sic] the danger of confusing the issues and misleading the jury, and as I said before, that is a colossal waste of time. Then we are going to have a mini-trial as to which of the statements she made were technically true or untrue and without more, I don't see any basis for finding that relevant to the defense of suicide." (Id., p.869.) The court further found "it's too remote and will involve a needless consumption of time and the Court has a responsibility to protect witnesses from harassment or undue embarrassment especially where it is not relevant to the issues before the Court." (Id.) The court acknowledged depression was an issue, but "[t]his does not require the defense [to] go through her entire life history to show why she was depressed." (Id., p.870.)

The issue was again raised during trial after the state introduced evidence that loans were taken against the policy. (Tr., Vol.VII, pp.833-43.) Abdullah contended the policy was relevant "to rebut ... the factual allegation that he had a motive to kill his wife." (Id., p.538.) Recognizing the state had not introduced evidence he was going to receive money under Angie's policy, but was going to receive money as a result of his policies, coupled with the court's concern that "we're going to spend a lot of time off on an extraneous piece of information that really has nothing to do with the case," the court affirmed its prior ruling. (Id., pp.538-43.)

The court did not err by excluding the evidence; there is not a "tit-for-tat" rule permitting admission of the evidence, particularly since admission of evidence regarding Abdullah's insurance policies and evidence regarding the loan taken against Angie's policy was directly related to his financial incentive to murder Angie. As conceded by Abdullah, one of the purposes of admitting the evidence was to present character evidence regarding Angie's "omissions and misrepresentations about her medical history on the insurance applications," which were allegedly "relevant to show that she was less than truthful with others with whom she interacted." (R., p.1156.) The admission of character evidence is governed by I.R.E. 608, but Rule 608 applies only to witnesses. The same is true with respect to I.R.E. 607. Even I.R.E. 404(a) prevents "[e]vidence of a person's character or a trait of character ... for the purpose of proving that the person acted in conformity therewith on a particular occasion." While there is an exception for evidence of a victim's character under I.R.E. 404(a)(2), it is limited to "rebut evidence that the victim was the first aggressor," which is not the case here. *See* State v. Arrasmith, 132 Idaho 33, 41 (Ct. App. 1998). The state is unaware of any rule permitting the admission of character evidence regarding Angie's allegedly false statements when she did not testify and was not the "first aggressor," and none has been cited by Abdullah.

Moreover, merely because Angie obtained life insurance several years prior to marrying Abdullah and continued to pay the premiums does not support the notion that she was suicidal years later, as demonstrated by the fact that she did not attempt suicide at any time proximate to purchasing the policy. Additionally, as explained in Hudson v. State Farm Mut. Ins. Co., 569 A.2d 1168 (Del. 1990), "Most life insurance policies contain a specific exclusion for suicide." While it is unknown if the policy Angie purchased contained such an exclusion, fault for that omission lies at Abdullah's door because he failed to make it part of the underlying record.

Therefore, it must be presumed the policy itself supports the decision of the district court. State v. Repici, 122 Idaho 538, 541 (Ct. App. 1992). Abdullah's other arguments regarding relevance are nothing more than a smokescreen to introduce improper character evidence.

More importantly, as explained by the court, any probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" or would have caused "undue delay, waste of time, or needless presentation of cumulative evidence." *See* I.R.E. 403. Not only would there have been "mini-trials" regarding which statements Angie made at the time she purchased the policy, but the events surrounding the suicide of her former husband, which precipitated her purchase of the policy, would have been litigated and resulted in exceptionally improper and unduly prejudicial evidence being presented to the jury. Additionally, considering the other evidence presented by the defense regarding Angie's alleged depression, the evidence had *de minimus* value, particularly in light of the exceptional prejudice associated with all of the baggage associated with the policy.

Finally, the state has established, beyond a reasonable doubt, that a rational jury would have convicted Abdullah even if the evidence had been admitted. *See* Johnson, 148 Idaho at 669. The evidence was cumulative of other evidence that was more timely and probative regarding Angie's alleged depression. More importantly, as detailed in section III above, the evidence establishing Abdullah's guilt is overwhelming.

VIII.
Abdullah Has Failed To Establish Fundamental Error Regarding His Claims Of Prosecutorial Misconduct During Closing Arguments

A. Introduction

Abdullah raises the following claims stemming from the prosecutors' closing arguments: (1) referring to Abdullah's absence at an "identification hearing"; (2) allegedly relying upon

statements for the truth of the matter when they were admitted for a limited purpose; (3) using the phrase, "it is the truth"; and (4) expressing shock and outrage at comments made during counsel's closing argument. (Brief, pp.52-56.) Not only has he failed to establish fundamental error, Abdullah has failed to establish the prosecutors' comments were error.

B. Standard Of Review

"In applying constitutional standards to the facts found, our review of a claim of due process violation is one of free review." State v. Gray, 129 Idaho 784, 796 (Ct. App. 1997).

C. General Standards Regarding "Prosecutorial Misconduct"

"Prosecutorial misconduct" "does not, *per se*, violate a defendant's constitutional rights." Runningeagle v. Ryan, 686 F.3d 758, 781 (9th Cir. 2012). Prosecutorial misconduct reaches the level of a constitutional violation only if the argument "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process," "misstate[s] the evidence," or "implicate[s] other specific rights of the accused such as the right to counsel or the right to remain silent." Darden v. Wainwright, 477 U.S. 168, 181-82 (1986). "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned." Id. at 181. Rather, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982). In Donnelly v. DeChristoforo , 416 U.S. 637, 646-47 (1974), the Court explained:

> The consistent and repeated misrepresentation of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most

> damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Moreover, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 11 (1985). Thus, the Court must consider the probable effect that the prosecutor's argument "would have on the jury's ability to judge the evidence fairly." Id. at 11-12.

D. Abdullah's Absence During The Identification Hearing

Abdullah filed a pre-trial motion to exclude Wood's identification testimony. (R., pp.179-80.) At the evidentiary hearing, Abdullah requested and personally waived his right to be present. (Tr., Vol.I, pp.275-76.) At the conclusion of Wood's trial testimony the prosecutor requested the court take judicial notice "that the defendant had actually been removed from a prior proceeding when [] Wood testified approximately a year ago at a time she would have been able to make an identification at a time more recent in her memory to the actual event." (Tr., Vol.VI, p.963.) Without objection, the court agreed to take judicial notice. (Id., pp.963-64.) The prosecutor then clarified, "And just to make it clear, Judge, that was at the request of the defense, neither the State nor the Court motivated that. It was someone at that table who motivated that movement of the defendant out of the courtroom." (Id., p.964.) Abdullah objected, and the court stated, "I'm not going to respond to that.... I'll take judicial notice of the fact that the defendant was not present during that testimony when she was here in the courtroom." (Id.) During closing argument the prosecutor noted, "You learned in the course of [Wood's] testimony that on the prior court appearance, not the trial, but some earlier court

appearance, the defendant caused himself to be removed from the room so she could not see him and yet here she came two years later." (Tr., Vol.VIII, p.97.) There was no objection.

Abdullah contends, because he allegedly had a due process right to be absent from the identification hearing, that the prosecutor's statement violated due process since the statement is "akin to comments on his right to remain silent, intended to prejudice [him] simply for challenging [] Wood's identification and making the State meet its burden of proof." (Brief, pp.53-54.) Abdullah has failed to cite any authority establishing he has a due process right to be absent from the identification hearing. While Neil v. Biggers, 409 U.S. 188, 198-99 (1972), reaffirmed, "[i]t is the likelihood of misidentification which violates a defendant's right to due process" that is determined based on the totality of circumstances surrounding four facts, it says nothing about a defendant having a due process right to be absent from an identification hearing. In Perry v. New Hampshire, 132 S.Ct. 716, 723 (2012), the defendant sought to expand Biggers to eyewitness identification made under suggestive circumstances not arranged by the police. Rejecting the argument, the Supreme Court recognized "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair," particularly since there are "other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability," id. at 728; the Court said nothing about defendants having a due process right to be absent from an identification hearing. Abdullah's other cases are likewise unavailing, saying nothing about a constitutional right to be absent from an identification hearing.

Abdullah's argument is contrary to established law because "[a] defendant has the right to be present at all stages of a criminal proceeding if absence could, under some set of circumstances, be harmful." State v. Wood, 132 Idaho 88, 108 (1998). Therefore, before a

defendant can be absent from such a hearing, he must waive his presence. In other words, it is his presence at the hearing that involves constitutional rights and his absence requires a waiver of those rights. Since there is no constitutional right to be absent from a hearing, the state's comment about Abdullah's absence is not "akin to comments on his right to silence" (Brief, p.54) because the right to silence is a constitutionally protected right and cannot be commented upon by the state during closing arguments. *See* Griffin v. California, 380 U.S. 609, 615 (1965). However, the state would be permitted to comment on the defendant's waiver of his Fifth Amendment right to remain silent, just as the prosecutor was permitted to comment on Abdullah's waiver of his constitutional right to attend the identification hearing. Moreover, even if the prosecutor's statement was inappropriate or constituted misconduct, because it did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process," "misstate the evidence," or "implicate other specific rights of the accused such as the right to counsel or the right to remain silent," Darden, 477 U.S. at 181-82, there is no constitutional violation, and the claim fails under Perry's first prong.

Because Abdullah has not attempted to establish counsels' failure to object to the comments was not tactical and the alleged error is not "plain," he has failed to establish Perry's second prong. As explained in United States v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991), "From a strategic perspective . . . many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality." Because there is a presumption counsel's failure to object was tactical, Paradis v. Arave, 954 F.2d 1483, 1494 (9th Cir. 1992), *vacated on other grounds*, 507 U.S. 1026 (1993), his claim fails under Perry's second prong.

Finally, he has failed to establish there was a reasonable possibility that the alleged error affected the outcome of the trial. Contrary to his contention, the comment was not "intended to inflame the jury and prejudice the jury against [him] [by] impermissibly asking them to conclude he was absent from the hearing because he was hiding from [] Wood" (Brief, p.54), but was an attempt to explain why Wood's identification of Abdullah in court was not as strong as when she identified his photo years earlier even though there was a hearing between those two events. (Tr., Vol.VI, pp.962-63.) Irrespective, as detailed in section III above, the evidence establishing Abdullah's guilt is overwhelming.

E. "The Truth Of The Matter Asserted"

Abdullah contends the prosecutor argued "for the truth" of some evidence that was admitted only to establish Angie's state of mind. (Brief, pp.54-55.) However, review of the two sections of the prosecutor's closing argument cited by Abdullah does not establish the prosecutor exceeded the scope of the limited admission of the testimony. (Tr., Vol.VIII, p.113, L.8-p.115, L.6; p.178, Ls. 1-11.) While the prosecutor certainly did not commence the argument by stating, "you can only consider this evidence to understand Angie's state of mind," it is clear from the entirety of the argument that was being argued. Additionally, as recognized by the district court (Tr., Vol.VI, pp.611-12), there was a reasonable inference to argue the evidence was part of the underlying motive that precipitated Angie's murder. *See* State v. Osterhoudt, 2013 WL 6015667, *8 (Ct. App. 2013). Based upon Darden, 477 U.S. at 181-82, even if the prosecutor's statement was inappropriate or constituted misconduct, there is no constitutional violation, and the claim fails under Perry's first prong. Because Abdullah has not even argued Perry's second and third prongs, he has failed to establish fundamental error, particularly in light of the closing

argument in Hairston, 133 Idaho at 507-08, that was much more egregious than the *de minimus* comments made in this case, but did not rise to the level of fundamental error.

F. "It's The Truth"

Taking three snippets from the prosecutor's closing argument out of context, Abdullah contends, without citation to authority, the prosecutor improperly stated, "It's the truth." (Brief, pp.55-56.) While "it is improper for a prosecutor to express a personal belief or opinion regarding the truth or falsity of any testimony or evidence," State v. Lovelass, 133 Idaho 160, 168 (Ct. App. 1999), the issue is not whether the prosecutor's statement was "proper" but whether it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process," Darden, 477 U.S. at 181-82. In context, none of the statements raised are "improper," let alone unconstitutional, but are merely argument based upon the evidence.

In context, the first statement involves the prosecutor's argument regarding Abdullah's opportunity to murder Angie and Wood's testimony:

> [O]n October 11th [Wood] was 100 percent sure when that photograph went down on the counter in front of her, that he was in her store one week before at till change, at midnight. Now that's less significant had those details been fed to her by law enforcement first, but all they said is, "We're doing an investigation. Do you recognize this man?" And she said, "Yeah, I know him. Why?" Because it is accurate. It is the truth and he made such an impression on her she could remember it. She was a very no nonsense, unbiased kind of a witness. Nothing to gain by being here. And she remembered him because he was rude. That's consistent with him being in a hurry. He had business in Boise. Putting him here at midnight gave him plenty of time to drive home and set the fire.

(Tr., Vol.VIII, pp.116-17.) The prosecutor's statement, "It is the truth," was merely an answer to the question Wood asked, why do you want to know if she recognized the man in the photo, and that her identification was accurate and truthful based upon events that occurred at the time, not that the prosecutor believed Wood's testimony. Prosecutors are permitted to express personal belief as to the credibility of witnesses if "based solely on inferences from evidence presented at

trial." Sheahan, 139 Idaho at 280; *see also* State v. Frauenberger, 154 Idaho 294, 304 (Ct. App. 2013) (rejecting claim that "she was honest with you" constitutes misconduct because "[p]rosecutors are entitled to ask jurors to draw inferences from the trial evidence, including inferences about a witness's credibility").

In context, the second statement involved a discussion of how Angie had Fluoxetine in her body without any gel capsules in her stomach, and reads as follow:

> [T]hat's kind of confusing until you figure out it only -- there's only one thing left that would explain it, that if she drank something. Then it would clear her stomach, and, you know, she had to drink it before the last meal because there's nothing in the contents, the stomach was full. If she had taken it with the meal, it would still be there. I'm no toxicologist, but it **is the only explanation that fits the evidence**, and, therefore, it is the truth.

(Tr., Vol.VIII, p.176) (emphasis added).

Like the first statement, this statement is based upon inferences from evidence presented at trial; it is not a personal belief as to any witness. Moreover, the district court ordered the jury to "disregard that last statement. The determination of what is truth and what is an untruth is for the jury and the jury alone." (Id.) While the court's instruction was unwarranted, it is still presumed the jury followed the instruction. Joy, 155 Idaho at 7. Moreover, the jury was twice advised, closing arguments are not evidence. (R., p.1578, JI. 1, JI 35).) Because the jury was so instructed, Abdullah has failed to establish error. *See* State v. Marmentini, 152 Idaho 269, 274 (Ct. App. 2011) ("[T]he jury heard the court admonish the prosecutor several times that his expressions of opinion were improper, and the jury was properly instructed before opening and closing statements that arguments and statements made by the lawyer were not evidence.").

In the third comment, there is no mention of "truth." Rather, while discussing the second round of testing requested by Abdullah's attorneys and ordered by Dr. Groben, the prosecutor stated, "We did it and I will tell you that everyone connected with the prosecution of the

defendant, from myself, Dr. Groben, the police agency were just shocked to find out about the extreme level of Prozac in the blood of Angie Abdullah." (Tr., Vol.III, p.172.) The district court immediately requested a side bar and advised the prosecutor not to talk "about what was going on in the prosecutor's office," and advised the jury to disregard the statement. (Id., pp.172-73.) Abdullah's contention that the statement was made to infer that "everyone on the defense team expected it to be there" (Brief, p.56), is nothing but speculation; it is just as reasonable to infer exactly what it stated, based upon the initial testing, the state was shocked to learn there was a mistake made during the initial testing. Moreover, while the court's concern was unwarranted, it is still presumed the jury followed the instruction. Joy, 155 Idaho at 7.

Even if the prosecutor's statement was inappropriate or constituted misconduct, because it did not "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process," there is no constitutional violation and the claim fails under Perry's first prong. Darden, 477 U.S. at 181-82. Because Abdullah has not attempted to establish counsel's failure to object to the comments was tactical and the alleged error is not "plain," he has also failed to establish Perry's second prong. Finally, he has failed to establish there was a reasonable possibility that the alleged error affected the outcome of the trial. The comments were *de minimus* and the evidence establishing Abdullah's guilt is overwhelming. *Compare* Severson, 147 Idaho at 718-21.

G. "Shock And Outrage"

After seven weeks of testimony, Abdullah's trial counsel recognized the evidence presented by the state – that he was in Boise at the time of Angie's murder – was overwhelming and, despite vigorously attempting to refute that evidence throughout the trial, conceded at the beginning of closing argument:

> Now, let me tell you right up front we are not going to be arguing that [Abdullah] did not drive to Boise on the morning of 5 October, 2002. We're not going to do that. Obviously there's evidence he did. But the essential thing you've got to know when deciding if the government's proved their charge here in this case is what happened inside that house because it is inside that house that Angela Abdullah died before the fire and it is in the garage of that house where the accidental ignition occurred. What happened inside that house and who beyond any reasonable doubt is responsible, that is the fundamental question that you'll have to decide.

(Tr., Vol.VIII, p.127.) The prosecutor responded, "You should be shocked and outraged that at the conclusion of this trial in his very last statements, Counsel wants you to believe that his client was here in Boise, did all the things that the State has proven he's done to get himself here and that he drove himself back to Salt Lake City and engaged in no criminal conduct." (Id., p.171.)

This was not a response calculated to disparage counsel or appeal to the jury's "passions, prejudices, and emotions" (Brief, p.56), but was a natural response that stated the obvious after Abdullah had so vigorously attempted to establish he was not in Boise despite overwhelming evidence to the contrary. Even if the prosecutor's statement was inappropriate, because it did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process," there is no constitutional violation and the claim fails under Perry's first prong. Darden, 477 U.S. at 181-82. Because Abdullah has not even attempted to establish counsel's failure to object to the comments was tactical and the alleged error is not "plain," he has also failed to establish Perry's second prong. Finally, he has failed to establish there was a reasonable possibility that the alleged error affected the outcome of the trial. The comment was *de minimus* and, as detailed in section III above, the evidence establishing Abdullah's guilt is overwhelming.

H. Cumulative Error

In Severson, 147 Idaho at 723 (quotes and citations omitted), this Court discussed the cumulative error doctrine in the context of closing arguments and fundamental error:

> Under the cumulative errors doctrine, an accumulation of irregularities, each of which might be harmless in itself, may in the aggregate reveal the absence of a fair trial in contravention of the defendant's right to due process. For the cumulative error doctrine to apply there must have been more than one error. Moreover, errors not objected to at trial that are not deemed fundamental may not be considered under the cumulative error analysis.

Because Abdullah has failed to establish fundamental error with respect to any, let alone two of his claims, his cumulative error argument fails, particularly since the t court instructed the jury that closing arguments are not evidence (R., p.1578, JI 1; JI 35), which the jury is presumed to have followed. State v. Kirby, 130 Idaho 747, 751 (Ct. App. 1997). Abdullah was not denied a fair trial as a result of the comments made by the prosecutor during closing argument.

IX.
Abdullah Has Failed To Establish Fundamental Error Regarding Swearing The Bailiff

A. Introduction

Abdullah contends his right to a fair trial was violated because "[t]here is no evidence in the record showing the district court properly swore the bailiffs who had custody of [his] jury during guilt phase and penalty phase deliberations." (Brief, p.57) (emphasis omitted). Because Abdullah is raising this issue for the first time on appeal, it must be reviewed under fundamental error, which he has failed to establish.

B. Standard Of Review

"In applying constitutional standards to the facts found, our review of a claim of due process violation is one of free review." Gray, 129 Idaho at 796.

C. Abdullah Has Failed To Establish Fundamental Error

Upon a jury retiring to deliberate, "an officer must be sworn to keep them together in some private and convenient place, and not permit any person to speak or communicate with them, not do so himself, unless by order of the court, or to ask them whether they have agreed

upon a verdict, and to return them into court when they have so agreed, or when ordered by the court." I.C. § 19-2133 The same oath must be given if a jury is sequestered. I.C. § 19-2126. "The statutory requirement that the bailiff be sworn to keep the jury together in a murder trial was enacted to guarantee defendant a fair and impartial trial" and "speaks in mandatory terms" requiring the record "affirmatively show that the bailiff was sworn." State v. Rodriguez, 93 Idaho 286, 289 (1969).

While the record does not detail the oath given to the bailiffs, it "affirmatively show[s] that the bailiff was sworn." At the conclusion of guilt-phase closing arguments, the district court stated, "At this time we will give the oath to the bailiffs and then we will pick the alternates." (Tr., Vol.VIII, pp.178-79.) The record "affirmatively" states, "(Oath given to the bailiffs.)" (Id., p.179.) At the conclusion of penalty-phase closing arguments, the court stated, "At this time we need to swear the bailiffs." (Id., p.515.) The record "affirmatively" states, "(Bailiffs are sworn.)". (Id.) Relying upon Rodriguez, *supra*, Abdullah contends, because the "record is silent regarding the nature of the oath," he was denied a fair trial before an impartial jury. (Brief, p.57.) Abdullah's claim fails on several fronts. First, Rodriguez is distinguishable because the issue was not the "nature of the oath," but whether an oath was even given. Because the record in this case affirmatively demonstrates an oath was given to the bailiffs, Rodriguez is inapposite. Second, Rodriguez does not stand for the proposition that a constitutional violation arises merely because the record is silent regarding whether an oath was given. Rather, while this Court talked in terms of the "Idaho statute" speaking in mandatory terms," no mention was made of such a violation raising constitutional concerns. Therefore, Abdullah cannot meet Perry's first prong because he has failed to establish any violation, much less a constitutional violation. *See* State v. Carter, 155 Idaho 170, 174 (2013).

The claim also fails because Abdullah has not established it "plainly exists (without the need for any additional information not contained in the appellate record)." Perry, 150 Idaho at 228. Because he failed to raise the issue before the district court, it is his burden to establish the bailiffs were not "properly" sworn. In Wilson v. State, 488 S.E.2d 121, 125-26 (Ga. 1997) (quotes and citation omitted), the defendant also bore the burden of affirmatively showing the bailiffs were not properly sworn, and "where bailiffs take charge of juries, there is a presumption that they were regularly sworn."

Finally, Abdullah has failed to establish the alleged failure to "properly" swear the bailiffs, even if true, was not harmless error. Even in Rodriguez, 93 Idaho at 289, where the issue was whether the bailiff had been sworn at all, this Court recognized prejudice was required, which "depends on the circumstances of the case and what was the jury's conduct during recess." Abdullah has failed to provide any argument or evidence surrounding the jury's conduct or what circumstances would lead to prejudice.

X.
Abdullah Has Failed To Establish Fundamental Error In Failing To Record The Bailiffs' Oath

A. Introduction

Abdullah next contends he was denied due process and meaningful appellate review because the swearing of the bailiffs was not recorded. (Brief, pp.58-59.) Because Abdullah failed to object to not recording the oath, his claim is reviewed under fundamental error and fails because he has not established Perry's three prongs.

B. Standard Of Review

"In applying constitutional standards to the facts found, our review of a claim of due process violation is one of free review." Gray, 129 Idaho at 796.

C. Abdullah Has Failed To Establish Fundamental Error

"The Supreme Court has never held that due process requires a verbatim transcript of the entire proceedings. To the contrary, it has specifically held that states may find 'other means of affording adequate and effective appellate review' of criminal convictions." Karabin v. Petsock, 758 F.2d 966, 969 (3rd Cir. 1985) (quoting Griffin v. Illinois, 351 U.S. 12, 20 (1956)). When "the information available is sufficient for the parties to argue the issues upon appellate review and for [the appellate] court to make informed decisions," there is no due process violation. Kien v. State, 782 N.E.2d 398, 406 (Ct. App. Ind. 2003). Admittedly, I.C. §1-1103 requires the court reporter to "correctly report all oral proceedings had in said court and the testimony taken in all cases tried before said court." As explained in Lovelace, 140 Idaho at 65 (emphasis in original), merely because "unrecorded proceedings *probably* dealt with appealable issues" does not establish a constitutional violation. *See also* State v. Wright, 97 Idaho 229, 331-33 (1975). Because there is no constitutional right to a verbatim transcript of the proceedings, Abdullah cannot establish the first Perry prong. As detailed in the prior section, even if the bailiff was not properly sworn, any alleged error was harmless and failing to record the oath was likewise harmless. It is difficult to imagine how there is a reasonable probability that failing to record the oath or even failing to give the proper oath to the bailiffs contributed to Abdullah's convictions.

XI.

Abdullah Has Failed To Allege Any Legal Error Associated With The District Court's Findings Involving The Grand Jury

A. Introduction

Abdullah contends the district court's findings regarding the validity of the grand jury that indicted him are not supported by substantial and competent evidence. (Brief, pp.59-61.)

Because Abdullah does not raise any error associated with the court's findings, this Court is barred from addressing this allegation.

B. Standard Of Review

"When considering alleged violations of constitutional rights, this Court defers to the district court's findings of fact unless clearly erroneous." State v. Thorngren, 149 Idaho 729, 735 (2010).

C. Abdullah Has Not Raised A Legal Challenge To The Court's Findings

On August 9, 2002, the Honorable Darla Williamson signed an Order Setting Hearing, ordering a hearing on August 28, 2002, at 1:30 p.m., to empanel a grand jury. (Sealed Grand Jury Documents.) Three additional orders were signed the same day regarding the empanelling of Grand Jury Panel A and B to commence on the same date and time. (Id.) Court minutes reflect the hearing commenced August 28, 2002, but at 9:15 a.m. (Id.) Panels A and B were seated at 11:41 a.m. (Id.) An Indictment charging Abdullah was signed by the Presiding Grand Juror on November 4, 2002, and filed November 15, 2002. (R., pp.19-23.) An Order discharging grand juries A and B was filed February 21, 2003. (Sealed Grand Jury Documents.)

In settling the appellate record, Abdullah filed a Second Objection to the Record requesting, "Any and all documents and/or transcripts relating to the formation and term of the grand jury that indicted [him]." (10/23/12 S.Ct. Order, Addendum A.) After the state filed a response (id., Addendum B), the district court held a hearing (id., Addendum C) and subsequently "reviewed the requested grand jury files *in camera* balancing grand jury secrecy with Abdullah's rights" (Order Re: Second Objection to Record on Appeal, p.2).[16] The court ultimately released the three documents that constituted public documents, but denied the request

[16] It is unclear whether the district court's order is part of the appellate record.

for additional documents or transcripts. (Id.) The court also found, based upon its *in camera* review, "that the grand jury panel that indicted Abdullah were [sic] duly empanelled on August 28, 2002, for a six month term" and "[t]here are no grounds to challenge the authority of the Ada County grand jury to issue an indictment on November 14, 2002, based on the legality of its existence." (Id., p.3.) On October 23, 2012, addressing Abdullah's motion, this Court ordered the district court clerk to "submit the items requested in [his] Motion to Augment previously filed with this Court" as confidential exhibits, including, "Documents and/or transcripts related to the formation and term of the grand jury that indicted Appellant." Various documents have been filed with this Court, but do not include transcripts regarding the formation of Abdullah's grand jury. (Sealed Grand Jury Documents.) Abdullah filed no further objections regarding the documents filed with this Court.

While not making any legal challenge to the formation or jurisdiction of the grand jury, Abdullah merely contends the district court's findings regarding the empanelling of Abdullah's grand jury are not supported by substantial and competent evidence. (Brief, pp.59-61.)[17] Because Abdullah has merely challenged the district court's findings without raising a legal challenge to the validity of the grand jury, his claim is without merit. In Lewiston Lime Co. v. Barney, 87 Idaho 462, 468 (1964), this Court found it "proper to counsel Appellants that any assignment merely asserting that some finding or conclusion of the trial court was erroneous is not a specific assignment of error under Supreme Court Rule 41 and will not be reviewed on appeal." Despite changes in Idaho's appellate rules, this fundamental rule continues. In Idaho Dept. of Health and Welfare v. Doe I, 150 Idaho 103, 113 (2010), this Court reaffirmed, "A

[17] The state recognizes an indictment issued after the expiration of the grand jury's term results in a loss of subject matter jurisdiction because it is invalid, which can be raised at any time. State v. Lute, 150 Idaho 837, 840-41 (2011).

general attack on the findings and conclusions of a trial court, without specific reference to evidentiary or legal errors is insufficient to preserve an issue.... Consequently, to the extent that an assignment of error is not argued and supported in compliance with the Idaho Appellate Rules, it is deemed to be waived." *See also* Clark v. Cry Baby Foods, LLC, 155 Idaho 182, 186 (2013) (quoting Bach v. Bagley, 148 Idaho 784, 790-91 (2010)).

Even if this Court addresses this claim, it fails because Abdullah has not established the district court's findings are clearly erroneous. "[E]ven if the evidence is conflicting, if the findings of fact are supported by substantial and competent evidence this Court will not disturb those findings on appeal." Shore v. Peterson, 146 Idaho 903, 907 (2009). Abdullah's argument stems from the fact that the hearing empanelling the grand jury was scheduled to commence at 1:30 p.m., but started earlier at 9:15 a.m. (Brief, p.61.) However, the issue is not whether there is another interpretation of the evidence, but whether the court's finding is supported by substantial and competent evidence. Because there is no evidence establishing any other grand juries were sitting at the time Abdullah was indicted and because the court reviewed all the documents involving the empanelling of Abdullah's grand jury, there is "substantial and competent evidence" supporting the court's finding that "[t]here are no grounds to challenge the authority of the Ada County grand jury to issue an indictment on November 14, 2002, based on the legality of its existence." Merely because the hearing started in the morning and not the afternoon does not mean the court's findings are clearly erroneous.

XII.
Changes In Idaho's Capital Sentencing Do Not Violate The *Ex Post Facto* Clause

A. Introduction

Abdullah filed a motion to declare Idaho's new death penalty statute unconstitutional, contending, in part, it violated the *Ex Post Facto* Clause. (R., pp.197-207.) The court rejected

the claim, concluding the statutory changes in 2003 did not alter the definition of first-degree murder or increase the punishment, but were merely procedural, and the filing of the state's Notice of Intent satisfied due process concerns. (R., pp.576-86.) Because I.C. § 18-4004 is "subject to" I.C. § 19-2515, Abdullah contends "no death penalty exists under section 18-4004 in the absence of a valid section 19-2515" resulting in a violation of the *Ex Post Facto* Clause and due process. (Brief, pp.64-66.) Abdullah's claim was rejected in Lovelace, 140 Idaho at 69-70.

B. Standard Of Review

"Constitutional issues are questions of law subject to free review by this Court." State v. Weber, 140 Idaho 89, 91 (2004). Whether there was an *ex post facto* violation is question of law subject to free review. State v. O'Neill, 118 Idaho 244, 245 (1990).

C. The *Ex Post Facto* Clause Does Not Apply To Procedural Changes

On June 24, 2002, the Supreme Court issued Ring v. Arizona, 536 U.S. 584, 609 (2002), which held that statutory aggravating factors are the "functional equivalent of an element of a greater offense" and must be proven to a jury beyond a reasonable doubt. This Court later recognized, "*Ring* rendered unconstitutional the sentencing scheme of I.C. § 19-2515 that required the trial judge to make the factual findings regarding the existence of aggravating circumstances." Lovelace, 140 Idaho at 66.

On November 15, 2002, the state filed an Indictment alleging Angie was murdered on or about October 5, 2002. (R., p.20.) On December 3, 2002, the state filed its Notice of Intent seeking imposition of the death penalty based upon four statutory aggravating factors. (R., pp.44-46.) Idaho's new death penalty scheme, codified at I.C. § 19-2515, requiring juries to find statutory aggravating factors, was signed on February 13, 2003, with an emergency clause making it retroactive as of that day. 2003 Idaho Sess. Laws, ch. 18, pp.70-76.

Abdullah's claim was rejected in Lovelace, 140 Idaho at 69 (quoting Dobbert v. Florida, 432 U.S. 282, 293-94 (1977)), when this Court recognized procedural changes in the law do not violate the *Ex Post Facto* Clause and explained I.C. § 18-4004 "describes first-degree murder and prescribes a punishment of life imprisonment or death, pursuant to the guidelines outlined in I.C. § 19-2515" and "Lovelace had fair warning that death was a possible punishment for first-degree murder." Id. Because the alterations in I.C. § 19-2515 did not change the definition of first-degree murder or increase the punishment, it was a procedural change, and new laws not affecting "matters of substance" but "remedies and modes of procedure" do not violate the *Ex Post Facto* Clause. Id. at 69-70. This Court also addressed due process, explaining, "Lovelace had adequate notice that his conduct constituted first-degree murder that carried a potential death sentence" and "the process formulated in the new statute changes only the decision maker from judge to jury." Id. at 70.

Abdullah attempts to distinguish Lovelace and Dobbert, contending, "the murders [in both] were committed before the death penalty had been invalidated," while in his case "Idaho's death penalty scheme had been deemed unconstitutional months prior to Angie's death and a new statute was not enacted until months later." (Brief, pp.65-66.) This is a distinction without a difference because the issue is not timing of the murder or enactment of a new statute, but whether the new statute "alters[ed] the definition of crimes or increase[d] the punishment for criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990) (cited in Lovelace, 140 Idaho at 69). Abdullah's distinction was rejected in State v. Galindo, 774 N.W.2d 190, 212-22 (Neb. 2009). Because this Court has already determined the 2003 changes do not place defendants "in jeopardy of any greater punishment than that already imposed under the superseded statutes,"

Lovelace, at 70 (quotation and citation omitted), there is no *ex post facto* violation, and Abdullah has failed to explain how a change in procedure denied him due process.

XIII.
The Death Penalty Is Not Unconstitutional Based Upon Evolving Standards Of Decency

A. Introduction

Based upon information from the Death Penalty Information Center, which opposes the death penalty, Ramdass v. Angelone, 530 U.S. 156, 197 n.21 (2000), Abdullah raises an Eighth Amendment claim based upon alleged changes in "the landscape of the United States" that "reflect our evolving standards of decency" and "no longer support death as a sentencing opinion." (Brief, pp.66-68.) Because this issue was not raised below and is a sentencing claim, it is subject to the Perry fundamental error standard as modified by Dunlap, 2013 WL 4539806 *6-8, which requires Abdullah to "prove an error occurred and that the error is not harmless, meaning that [he] must show that there is a reasonable possibility that [he] would not have been sentenced to death Abdullah has failed to establish an Eighth Amendment violation.

B. Standard Of Review

Constitutional issues are subject to free review. Weber, 140 Idaho at 91.

C. The Death Penalty Does Not Violate The Eighth Amendment

"The Eighth Amendment prohibits the imposition of cruel and unusual punishment, which is determined by 'evolving standards of decency that mark the progress of a maturing society.'" Dunlap, 2013 WL 4539806, *28 (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002) (quotes and citation omitted)). "Proportionality review under those evolving standards should be informed by objective factors to the maximum possible extent" and "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Atkins at 311 (quotes and citations omitted).

Abdullah has failed to cite any jurisdiction that has concluded the death penalty is no longer constitutional based upon criteria from the Death Penalty Information Center. (Brief, p.68.) Abdullah's claim is premised upon information over the "past 6 years," but his death sentence was imposed eight years ago on March 4, 2005 (R., pp.1546-49), making the information of dubious relevance. Moreover, as recently as 2008, the Supreme Court reiterated it was "settled" by Gregg v. Georgia, 428 U.S. 153, 177 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), whether "capital punishment is constitutional." Baze v. Rees, 553 U.S. 35, 47 (2008). As explained in U.S. v. Hatter, 532 U.S. 557, 567 (2001), "it is [the Supreme] Court's prerogative alone to overrule one of its precedents." Additionally, citing U.S. v. Lighty, 616 F.3d 321, 370 (4th Cir. 2010), the Fourth Circuit recently reaffirmed that Abdullah's argument "would run afoul of the Supreme Court." U.S. v. Runyon, 707 F.3d 475, 521 n.7 (4th Cir. 2013). Obviously, nothing significant has changed in the last few years to establish evolving standards of decency have changed such that the death penalty is no longer constitutional. *See also* U.S. v. Mitchell, 502 F.3d 931, 981 (9th Cir. 2007) (rejecting a claim that "evolving standards of decency" prohibit the execution of a 20-year-old); Johnson v. U.S., 860 F.Supp.2d 663, 913 (N.D. Iowa 2012); State v. Pruitt, 2013 WL 5530772, *26 (Tenn. 2013) ("We find no significant legislative or judicial retreat from felony murder or the imposition of the death penalty for felony murder when the respective statutory criteria for capital punishment are met."); State v. Berget, 826 N.W.2d 1, 27-28 (S.D. 2013) (rejecting the contention that recent Supreme Court decisions evidence a "shift of tolerance regarding capital punishment of adult offenders"); State v. Rizzo, 31 S.3d 1094, 1167 (Conn. 2011) ("It remains settled federal law, however, that the death penalty in general is constitutionally permissible."). "While it is possible that a national consensus against [the death penalty] may develop at some point, [Abdullah] has provided no

evidence of such a consensus," and rejection of such a claim at this point "is in line with the unanimous opinion of those courts that have considered" whether the death penalty is unconstitutional. State v. Draper, 151 Idaho 576, 598-99 (2011).

XIV.
Statutory Aggravators Need Not Be Alleged In The Indictment Or Their "Factual Support" Alleged In The Notice Of Intent

A. Introduction

While the Indictment filed by the state on November 15, 2002, did not allege any statutory aggravators (R., pp.19-23), the state's Notice of Intent alleging four statutory aggravating factors was filed December 3, 2002, but did not allege "factual support" for the aggravators (R., pp.44-46). Abdullah filed a Motion to Strike contending the statutory aggravators had to be alleged in the Indictment (R., pp.497-98) and an Objection to State's Notice of Intent because it failed to "give fair notice of the facts" that the state intended to use to prove each aggravator (R., pp.506-07). The district court denied both motions. (R., pp.587-92.)

Dunlap contends the district court erred by denying his motion to strike the state's notice of intent because they were not alleged in the Indictment and failed to provide factual support for the aggravators alleged. (Brief, pp.68-72.) Because statutory aggravators are not required to be pled in the Indictment and the "factual support" for the aggravators is not required in the state's notice of intent, Abdullah's claim fails.

B. Standard Of Review

Constitutional issues are subject to free review. Weber, 140 Idaho at 91.

C. Failing To Charge Statutory Aggravators In The Indictment And Allege Facts

Abdullah's claim is centered on the changes that resulted from Ring, *supra.* While Ring concluded statutory aggravating factors are no longer mere "sentencing factors," "that does not,

ipso facto, mean that they have to be alleged in an indictment." Evans v. State, 886 A.2d 562, 576 (Md. 2005). As recognized in McKaney v. Foreman, 100 P.3d 18, 22 (Ariz. 2006) (citing cases), "All state jurisdictions with one exception have thus far held, as we hold today, that aggravating factors need not be specified or alleged in the indictment," and explained:

> [T]here is a difference between "elements" for purposes of the Sixth Amendment right to trial by jury and the "functional equivalent of an element" for purposes of finding a state constitutional right to have aggravating factors alleged in an indictment or information. In the former, the trial jury addresses the adequacy of proof of the actual elements of the crime and the presence of aggravators to determine the defendant's guilt or innocence and to fix the sentence. In the latter, we address simply the adequacy of notice.

Id. at 22; *see also* State v. Dague, 143 P.3d 988, 1009-10 (Alaska 2006) (citing cases).

This Court implicitly adopted the analysis from McKaney in Porter v. State, 140 Idaho 780, 784 (2004), explaining, "*Ring* did not elevate those statutory aggravating circumstances into elements of a crime, nor did it create a new crime." And in Lovelace, 140 Idaho at 70, the Court addressed the same issue and reasoned, "It has not been shown how Lovelace will be denied due process in the resentencing based on the state's failure to allege statutory aggravating factors in the information."

Moreover, the single exception upon which Abdullah relies – New Jersey – (Brief, p.71), is based upon state law. State v. Fortin, 843 A.2d 974 (N.J. 2004) ("our State Constitution requires that aggravating factors be submitted to the grand jury and returned in an indictment" because, "[a]lthough we recognize that the Fifth Amendment right to indictment by a grand jury does not apply to the State, we have never construed our grand jury provision under Article I, Paragraph 8 as providing less protection than its federal counterpart"). Unlike New Jersey, Idaho has declined to provide all the protections afforded by the Fifth Amendment's grand jury requirements. *See* State v. Simmons, 115 Idaho 877, 878 (Ct. App. 1989).

Based upon Porter, *supra,* the Indictment in Abdullah's case contained "a plain, concise and definite written statement of the essential facts constituting the offense charged," *see* I.C.R. 7(b), even though it did not allege the statutory aggravating factors. Nothing more was required under Idaho's criminal rules or the Constitution.

Abdullah's "factual basis" claim likewise fails. While I.C. § 18-4004A requires the state to file a notice of intent to seek the death penalty, it merely requires the state to "include a listing of the statutory aggravating circumstances that the state will rely on in seeking the death penalty"; it does not mandate that the state detail each and every fact upon which the respective statutory aggravating factor is based. *See* Soto v. Commonwealth, 139 S.W.3d 827, 843 (Ky. 2004) ("This notice requirement is satisfied by timely filing a formal notice of intent to seek the death penalty and the aggravating circumstances upon which the Commonwealth intends to rely."); *compare* McConnell v. State, 102 P.3d 606, 626 (Nev. 2004) (although **statute** required state to "allege with specificity the facts on which the state will rely to prove each aggravating circumstance," there was no prejudice as a result of a "technical" statutory violation). Because the state filed a notice listing the statutory aggravating factors upon which it intended to rely at the resentencing, sufficient notice was provided.

Neither does due process require additional notice. U.S. v. Higgs, 353 F.3d 281, 325 (4th Cir. 2003) ("The FDPA and the Constitution require that the defendant receive adequate notice of the aggravating factor, which Higgs admittedly received in this case, not notice of the specific evidence that will be used to support it."); U.S. v. Battle, 173 F.3d 1343, 1347 (11th Cir. 1999) ("The Government is not required to provide specific evidence in its notice of intent."). As explained in Wood, 132 Idaho at 105 (quoting Dobbert, 432 U.S. at 297), "The U.S. Supreme Court has pointed out that the 'existence [of a death penalty statute] on the statute books

provided fair warning as to the degree of culpability which the State ascribed to the act of murder.'" Based upon the statutory aggravators listed in I.C. § 19-2515 and alleged in the state's Notice of Intent, due process was satisfied.

XV.
The Statutory Aggravators Are Not Unconstitutionally Vague

A. Introduction

Abdullah contends this Court has historically applied an incorrect standard to challenges involving facially vague criminal laws, which should be used in facial challenges to statutory aggravating factors. (Brief, pp.73-76.) He then challenges the four statutory aggravating factors alleged in the state's Notice of Intent. (Id., pp.76-81.) This Court has applied the correct standard associated with reviewing the alleged vagueness of statutory aggravators. The two statutory aggravating factors unanimously found by the jury are not unconstitutionally vague because they appropriately channel the sentencer's discretion, and the two not found by the jury are moot. Finally, any alleged error is harmless because the jury weighed the collective mitigation against the two aggravators individually.

B. Standard Of Review

"Constitutional issues are reviewed *de novo*." Dunlap, 2013 WL 4539806, *24.

C. General Principles Of Law Regarding Vagueness Challenges To Aggravators

Abdullah "urges this Court to apply the correct standard of review for challenges to facially vague criminal laws," requesting this Court apply a vagueness standard that does not require a showing that a criminal law is impermissibly vague in all of its applications. (Brief, p.73.) Abdullah's argument is unavailing because he has failed to cite any case where this standard has been applied to statutory aggravating factors. The standard he desires has been applied to criminal statutes involving loitering, which the Supreme Court recognized "is based

upon the potential for arbitrarily suppressing First Amendment liberties." Kolender v. Lawson, 461 U.S. 352, 358 (1983); *see also* City of Chicago v. Morales, 527 U.S. 41, 45-46 (1999). Rather, "[c]laims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988). As explained in Bell v. Cone, 543 U.S. 447, 453 (2005) (emphasis added) (quoting Walton v. Arizona, 497 U.S. 639, 654 (1990)), *overruled on other grounds,* Ring, 536 U.S. 584), "The law governing vagueness challenges to statutory aggravating circumstances was summarized aptly in *Walton*":

> "When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide **any guidance** to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide **some guidance** to the sentencer."

Indeed, in Lewis v. Jeffers, 497 U.S. 764, 772-78 (1990), the Supreme Court began its examination of an "as applied" challenge to a statutory aggravator by reaffirming the law associated with a facial challenge. Ultimately, the Court concluded it had previously rejected an "as applied challenge" and reaffirmed that holding. Id. at 778-80 (citing Walton, 497 U.S. at 655-56). Therefore, the state will examine Abdullah's vagueness challenges under the umbrella of the Supreme Court's capital jurisprudence; any argument to the contrary should be rejected.

D. Challenges To The Two Aggravators Not Found By The Jury Are Moot

Abdullah challenges all four statutory aggravators alleged in the state's Notice of Intent (Brief, pp.76-81), including: (1) great risk; (2) HAC; (3) utter disregard; and (4) propensity. The

jury unanimously found two aggravators, great risk and utter disregard, but was unable to reach a unanimous verdict on HAC and propensity. (R., pp.1497-98.)[18]

"An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief." State v. Barclay, 149 Idaho 6, 8 (2010) (quotations and citation omitted). Even if moot, three exceptions permit this Court to review the merits of a claim: "(1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interests." Id. Because the death penalty was not imposed based upon the HAC and propensity aggravators, there is no "real and substantial controversy" surrounding those two aggravators. Moreover, Abdullah has not contended he can establish any of the three exceptions, and even if the two aggravators are reviewed, his claims would fail.[19]

Recognizing this Court has repeatedly determined the HAC aggravator, with this Court's limiting construction from State v. Osborn, 102 Idaho 405, 418 (1981), provides sufficient guidance to the sentencer, *see e.g.,* State v. Lankford, 116 Idaho 860, 877 (1989), Abdullah relies upon Lankford, 116 Idaho at 876-77, in which this Court distinguished Maynard v. Cartwright, 486 U.S. 357 (1988), based upon judge sentencing in Idaho.[20] (Brief, pp.77-78.) However, as explained in Leavitt v. Arave, 383 F.3d 809, 835-37 (9th Cir. 2004), Maynard is distinguished not just because the factfinder was a judge, but because Osborn further restricts the application of

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[18] At the time of Angie's murder, the aggravators were codified at I.C. § 19-2515(h)(3), (5), (6), and (8), and were subsequently amended and recodified at I.C. § 19-2515(9)(c), (e), (f), and (h).
[19] If Abdullah has challenged all four aggravators because of his belief that if he is retried or resentenced a new jury is not barred from considering the two aggravators since he was not acquitted of them, the state agrees. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 109 (2003).
[20] The jury was instructed pursuant to the limiting language in Osborn, 102 Idaho at 418. (R., p.1578, JI 45.)

HAC to those cases "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim," which is language approved in Proffitt v. Florida, 428 U.S. 242, 255-56 (1976).

Presumably, because this Court has repeatedly found the propensity aggravator is constitutional, *see e.g.,* State v. Dunlap, 125 Idaho 530, 536 (1993), Abdullah's argument against the propensity aggravator also rests upon the change from judge to jury sentencing. (Brief, pp.79-81.) However, there is nothing in this Court's prior decisions implying the language of this aggravator and the additional instruction from State v. Creech, 105 Idaho 362, 370-71 (1983), is limited to a judge.[21] Moreover, Abdullah fails to understand the role of the limiting language from Creech, 105 Idaho at 370-71, which focuses the aggravator upon the continuing threat to society resulting from a killer who is likely to murder again with less than a normal amount of provocation. This does not include "every defendant eligible for the death penalty." Arave v. Creech, 507 U.S. 463, 474 (1993). As explained in Jurek v. Texas, 428 U.S. 262, 274 (1976), while it is not easy to predict future behavior, it does not mean it cannot be done. Further, the Supreme Court has continued to uphold aggravators based upon a predictive judgment from a defendant's behavior. Tuilaepa v. California, 512 U.S. 967, 976-77 (1994).

E. The Great Risk Aggravator Is Constitutional

Contending the words, "knowingly," "great risk," and "many persons" are undefined and subject to several interpretations, Abdullah contends the great risk aggravator is unconstitutionally vague. (Brief, pp.76-77.) Presumably to address Abdullah's concerns regarding the aggravator, the district court instructed the jury, "The phrase 'great risk of death to

[21] The jury was instructed pursuant to the limiting language in Creech, 105 Idaho at 370-71. (R., p.1578, JI 48.)

many persons' means more than a showing of some degree of risk of bodily harm to a few persons. 'Great risk' means not a mere possibility but a likelihood or high probability. 'Many persons' means more than four people." (R., p.1578, JI 47.) Abdullah does not contend these definitions are inadequate or otherwise unconstitutional, but merely asserts the court's action of defining terms he contended were too vague "is not a valid exercise of judicial discretion, but is a legislative act which violates principles of separation of powers." (Brief, pp.76-77.) As will be discussed below, Abdullah's separation of powers argument is meritless. Because he has not otherwise challenged the definitions provided by the court, his vagueness claim fails.[22]

Moreover, while this Court has not previously addressed the constitutionality of the great risk aggravator, the Supreme Court has examined an identical aggravator from Florida and determined it is not unconstitutionally vague. Proffitt, 428 U.S. at 255-56, Florida has continued to utilize that aggravator and the definitions used by the district court. Johnson v. State, 696 So.2d 317, 325 (Fla. 1997). Relying upon Proffitt, two federal district courts have reasoned a nearly identical federal aggravator is not vague. O'Reilly, 2007 WL 2420830 at, *4-5; U.S. v. Cheever, 423 F.Supp.2d 1181, 1202-03 (D. Kan. 2006). And as recognized by the district court (R., pp.601-03), other courts addressing the great risk aggravator have reasoned it is not unconstitutionally vague. *See e.g.* Wilson v. State, 777 So.2d 856, 922 (Ala. Crim. App. 1999) (quoting Williams v. State, 710 So.2d 1276, 1341 (Ala. Cr. App. 1996)) (the phrase, "knowingly created a great risk of death to many persons," is a phrase "written in plain English and contains no terms of art or legal jargon); People v. Dunlap, 975 P.2d 723, 49 (Colo. 1999) (great risk

[22] As recognized in U.S. v. O'Reilly, 2007 WL 2420830, *4 (E.D. Mich. 2007) (citations omitted), "Vagueness is evaluated on the words used to define the aggravator and on the construction given by the courts. The construction of an aggravating factor is reflected largely by the jury instructions relating to that aggravator. This Court concludes that the parties and the Court can draft jury instructions that will adequately define 'grave risk' for the sentencer."

aggravator reads, "In the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense" and required no further definitions but could be applied "under the common sense interpretation of the text"); Wood v. State, 158 P.3d 467, 477 (Okla. Crim. App. 2007); Simmons v. Mississippi, 805 So.2d 452, 496-97 (Miss. 2002), *rev'd on other grounds,* Simmons v. Epps, 654 F.3d 526, 535-37 (5th Cir. 2011).

While many jurisdictions utilize a great risk aggravator, Abdullah has not cited any case finding such an aggravator unconstitutionally vague. Idaho's great risk aggravator is written in plain English and needs no further definition to pass a vagueness challenge. To the extent further definitions are mandated, those provided by the district court are sufficient to provide "some guidance" to the juror. The additional instructions "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and 'make rationally reviewable the process for imposing a sentence of death.'" Lewis, 497 U.S. at 774 (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980)).

Abdullah further contends the great risk aggravator "has to have some relationship to the first degree murder at issue in a death penalty case" and because the aggravator was allegedly "tied to the arson offense" since Angie died prior to the fire, "it was not properly alleged and cannot be relied upon to support [his] death sentence." (Brief, p.81.) Abdullah's claim fails even assuming the validity of his legal argument because there was a direct connection or continuous string of events from the murder to Abdullah's escape from the fire scene. The evidence presented to the jury showed the aggravator was tied to Angie's murder because the arson was the means Abdullah used to eliminate evidence of her murder which was one continuous course of events or acts.

Cases from other jurisdictions are instructive. In Simmons v. State, 805 So.2d 452, 470 (Miss. 2002), after shooting the victim, the defendant dismembered the victim's body and dumped it in the bayou alligators were known to inhabit. Asserting that placing body parts in community waters created a great risk of harm to many people, the state utilized the great risk aggravator, which the Mississippi Supreme Court affirmed because the defendant "contaminated the recreational waters of the residential neighborhood," and it "involved actions [that] were intended to attract alligators and other similar creatures in an effort to use what nature had to offer to dispose of the evidence. Adjoining landowners and other water enthusiasts were subjected to this inherent danger as a direct result of Simmons' actions." Id. at 496. Relying upon Simmons, and in a remarkably similar case cited by Abdullah, the Mississippi Supreme Court affirmed the great risk aggravator where the victim died from knife wounds, the defendant then started a fire in the hotel room where the body was recovered, and in addition to the desk clerk on duty at least one other guest was staying at the Rocky Creek Inn on the night in question. Goff v. State, 14 So.3d 625, 634-37, 667 (Miss. 2009). *See also* Way v. State, 496 So.2d 126, 128 (Fla. 1986) (finding sufficient evidence based, in part, upon five police and firemen who "were endangered in their attempt to rescue the victims prior to the arrival of firefighting equipment"); Welty v. State, 402 So.2d 1159, 1165 (Fla. 1981) (affirming the great risk aggravator when the fire was started after the victim died from strangulation, concluding, "the fire posed a direct threat of death to those six elderly persons residing in the building as well as the neighbors, firefighters, and police responding to the call") *but see* King v. State, 514 So.2d 354, 360 (Fla. 1987) (appearing to limit prior cases because the great risk associated with firefighters and police responding to the scene in that case was more of a "possibility" as opposed to a "high probability," but reaffirming that setting fire to a building with six sleeping

people inside qualified as great risk of death to many persons); *compare* Scull v. State, 553 So.2d 1137, 1142 (Fla. 1988) (rejecting the great risk aggravator when the "fire was confined to one room of a concrete block house and that fire was minimal enough to have nearly burned out by the time firefighters arrived, six minutes after receiving the call").

As explained by Justice Marshall after reviewing Florida's cases surrounding this aggravator, "something in the nature of the homicidal act itself or in the conduct immediately surrounding the act must create a great risk to many people." Barclay v. Florida, 463 U.S. 939, 978 (1983) (Marshall, J., dissenting). King, the Florida case upon which Abdullah relies (Brief, p.82), stands in stark contrast where, as detailed above, the house was fully engulfed and neighbors and firefighters were at great risk of death during their rescue attempts. At a minimum, the aggravator applies to the three children in the house at the time of the fire. Assuming this standard applies to Idaho's great risk aggravator, it was properly utilized and the state met its burden.

F. The Utter Disregard Aggravator Is Constitutional

Recognizing the utter disregard aggravator was found constitutional in Creech, 507 U.S. at 471-74, Abdullah contends the change from judge to jury sentencing results in the aggravator being unconstitutionally vague. (Brief, pp.78-79.) This argument was rejected in Dunlap, 2013 WL 4539806, *25, because this Court recognized Creech was based upon the "ordinary usage" of the words "cold-blooded, pitiless slayer."

G. Harmless Error

Should this Court conclude one of the two statutory aggravating factors found by the jury is unconstitutionally vague, any error was harmless because the jury weighed the collective mitigation against each aggravator individually. *See* Dunlap, 2013 WL 4539806, *10.

XVI.
This Court's Narrowing Of Statutory Aggravators Does Not Violate The Separation Of Powers Doctrine

A. Introduction

Abdullah contends Idaho's statutory aggravators are the "functional equivalent of elements of capital murder and, because "only the legislative branch is empowered to declare what is a crime and what elements make up that crime," this Court's narrowing constructions of the aggravators "constitute a judicially-created crime which must be stricken." (Brief, p.83.) Because this issue was not raised below, it is subject to the Perry fundamental error standard as modified by Dunlap, 2013 WL 4539806 *6-8, and Abdullah has failed to meet those standards.

B. Standard Of Review

"Constitutional issues are reviewed *de novo*." Dunlap, 2013 WL 4539806, *24.

C. Abdullah Has Failed To Establish A Separation Of Powers Violation

Abdullah's argument is premised upon art. II, § 1 of the Idaho Constitution, which reads as follows:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

"It is uniformly held that the power to define crime and fix punishment therefore rests with the legislature," Malloroy v. State, 91 Idaho 914, 915 (1967), and "Idaho courts are not free to add or subtract elements at will," State v. Nevarez, 142 Idaho 616, 620 (Ct. App. 2005). However, this "uniformly held" principle has never prevented this Court from defining terms within a statute that have gone undefined by the legislature and constitute the respective elements. *See* State v. Eastman, 122 Idaho 87, 89-90 (1992). Indeed, trial courts are "under the

affirmative duty to properly instruct the jury." Id. at 91. As recognized in State v. Fetterly, 126 Idaho 475, 476 (Ct. App. 1994) (quoting I.C. § 19-2132(a)), "In Idaho, a trial judge must charge the jurors with "'all matters of law necessary for their information.'" In Victorino v. State, 23 So.3d 87, 104 (Fla. 2009), the court applied this basic principle to Florida's HAC aggravator, rejecting the contention that "ascribing to the words of the statute their plain and ordinary meaning violates the constitutional separation of powers." By providing a narrowing definition for statutory aggravators, this Court is not establishing "what elements make up that crime" (Brief, p.83), but is providing definition to the words that make up the respective statutory aggravators. A similar challenge was made in State v. Rae, 139 Idaho 675, 652-53 (Ct. App. 2004), with the defendant raising a separation of powers argument when the trial court instructed the jury on included offenses where neither party had requested such instructions. Finding courts have inherent authority to instruct a jury on included offenses, the court of appeals opined there was no separation of powers violation. Because this Court has authority under I.C. § 19-2132(a) and inherent authority to properly instruct a jury, there is no separation of powers violation.

Abdullah's argument is also premised upon the dictates of Ring, 536 U.S. at 585. However, Ring did not elevate statutory aggravating circumstances into elements of a crime or create a new crime, but "merely held that a state cannot impose the death penalty unless its sentencing procedures have the jury, not the judge, determine the existence of a statutory aggravator." Porter, 140 Idaho at 784.

Abdullah has failed to establish harmless error because, while this Court has provided a limiting instruction for HAC, *see* Osborn, 102 Idaho at 418, no such instruction has been provided for the great risk aggravator. Indeed, Abdullah challenges only the Court's limiting

instructions for HAC and utter disregard. (Brief, pp.83-84.)[23] Because Abdullah has not raised this issue in regard to the great risk aggravator and it was weighed individually against the collective mitigation, any alleged error was harmless. *See* Dunlap, 2013 WL 4539806, *10.

XVII.
Abdullah Has Failed To Establish Fundamental Error Associated With Angie's Step-Sister's Victim Impact Statement

A. Introduction

Several family members, including Stephanie Williams, Angie's step-sister, read victim impact statements ("VIS"). (Tr., Vol.VIII, pp.450-54.) Abdullah does not challenge the content of the VIS, but based upon this Court's interpretation of what constitutes an "immediate family member" under I.C. § 19-5306(3), he contends it was error to permit Stephanie to make a VIS. Because this issue was not raised below, it is subject to the Perry fundamental error standard as modified by Dunlap, 2013 WL 4539806 *6-8, and he has failed to establish any of the three Perry prongs.[24]

B. Standard Of Review

"The interpretation of a statute is a question of law over which this Court exercises free review." State v. Payne, 146 Idaho 548, 575 (2008).

C. Step-Siblings Are Included Within The Statutory Definition

In Payne, 146 Idaho at 575, this Court recognized the legislature had not defined the term "immediate family member" in I.C. § 19-5306(3). The Court considered other statutory definitions as well as the definition from Black's Law Dictionary and defined "immediate family members" as "parent, mother-in-law, father-in-law, husband, wife, sister, brother, brother-in-law,

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[23] Because the jury did not unanimously find the utter disregard aggravator, Abdullah's repeated challenges to it are perplexing and will not be further addressed by the state.

[24] Abdullah filed a motion regarding VIS, but it was not based upon who could give a VIS, but the content of the VIS, an entirely different issue. (R., pp.491-94.)

sister-in-law, son-in-law, daughter-in-law, or a son or daughter." Payne, 146 Idaho at 575; *see also* State v. Shackelford, 2013 WL 5819539, *9 (2013). Of course, the Court did not have the opportunity to determine whether step-siblings are included within the definition of "immediate family members." Black's defines "immediate family members" as "1. A person's parents, spouse and siblings. 2. A person's parents, spouse, children and siblings, as well as those of the person's spouse." Payne, 146 Idaho at 575 (quoting Black's Law Dictionary 273 (2d Pocket ed. 2001)). "The term 'child' or 'children' may include or apply to: adopted, after-born, or illegitimate child; step-child; child by second or former marriage; issue." Black's Law Dictionary 217 (5th ed. 1979). Under Idaho's Uniform Custodial Trust Act, "members of the beneficiary's family" include step-children. I.C. § 68-1301(10). By definition, a step-child is a biological child of one of the parents and, upon marriage, becomes an immediate family member just like in-laws. As a matter of policy, there is no reason to exclude step-siblings or children as immediate family members for purposes of a VIS. Because step-family members are immediate family members, there was no error, and Abdullah has not established Perry's first prong.[25]

D. Abdullah Has Failed To Establish The Alleged Error Is Not Harmless

Abdullah has also failed to establish Perry's third prong, requiring that he "show that there is a reasonable possibility that [he] would not have been sentenced to death." Dunlap, 2013 WL 4539806, *8. In addition to Stephanie's VIS, the jury heard VIS from Evelyn Whittington, Angie's mother (Tr., Vol.VIII, pp.447-48), Randy Jewett, Angie's sister (id, pp.448-50), and Leslie Beck, Angie's cousin (id., pp.454-56). Abdullah has not challenged the content of any of the three VIS, including Leslie's, Angie's cousin. More importantly, there is nothing in Stephanie's VIS that remotely establishes Abdullah would not have been sentenced to death but

[25] This claim also fails under fundamental error because it is not a constitutional claim but only a statutory claim. *See* Perry, 150 Idaho at 228.

for her VIS; it merely explained the impact of Angie's murder on the family by describing one particular family gathering after Angie's murder and the impact Angie's absence had on the gathering. (Id., pp.450-53.) Abdullah has failed to meet his burden under Perry's third prong.

XVIII.
Abdullah Has Not Established Fundamental Error Regarding The Prosecutor's Guilt-Phase Closing Argument

A. Introduction

Abdullah contends the prosecutor's reference during closing argument to the proper penalty under Islamic law for murder constituted an appeal to the jury to consider religion in violation of due process. (Brief, pp.85-86.) Because this issue was not raised below, it is subject to the Perry fundamental error standard as modified by Dunlap, 2013 WL 4539806 *6-8, and he has failed to establish any of the three Perry prongs.[26]

B. Standard Of Review

"In applying constitutional standards to the facts found, our review of a claim of due process violation is one of free review." Gray, 129 Idaho at 796.

C. Abdullah Has Failed To Establish Fundamental Error[27]

During his final closing argument, the prosecutor stated, "You will recall that point in the trial when I examined the Imam from the mosque in Salt Lake City, Mr. Shuaib, you will recall that in answer to counsel's question, I asked the Imam what is the penalty for murder under Islam." (Tr., Vol.VIII, p.513.) The court immediately ordered counsel to approach for a "side bar," stating, "I know where you're going. Don't go there," and then asked, "Are you bringing in the fact that the penalty should be death?" (Id. at 514.) The prosecutor explained that was not

[26] Abdullah also notes equal protection. (Brief, p.85.) Because he has failed to cite any authority or argument in support of the claim, it is waived. Zichko, 129 Idaho at 263.

[27] In section VIII above, the state has previously articulated the standards for a due process violation based upon prosecutorial misconduct during closing arguments.

his purpose because "that's not the law that we have in this state, that we don't get to execute somebody just because they commit a murder. That's my point." (Id.) After the side bar, the prosecutor continued:

> You'll recall in response to the question by counsel what the penalty for murder under Islamic law is and the answer was death for death. But we're not Islamic law. You are obligated to follow the laws of the state as given you by this Judge. That law is express in this instruction that you have. Idaho law has been structured so that the only persons who will be eligible to receive the death penalty are the worst of the worst. That's why you have to find an aggravator.

(Id.)

The prosecutor's statement was not an appeal to the jurors to decide the penalty based upon factors other than the evidence or the law, but just the opposite: the jury could not consider evidence adduced during the guilt-phase regarding the Islamic penalty for murder, but had to find a statutory aggravator before Abdullah was even eligible for the death penalty. Not only has Abdullah failed to establish a due process violation based upon the statement, he has not even established misconduct. *See* State v. Rothwell, 154 Idaho 125, 134 (Ct. App. 2013) ("The prosecutor was not attempting to persuade the jury to convict Rothwell for an improper reason, but was asking the jury not to acquit Rothwell for an improper reason."). Even if it was misconduct to make such a statement, and "religiously based arguments are universally condemned," Boyd v. French, 147 F.3d 319, 398 (4th Cir. 1998), there was no due process violation because universal condemnation is insufficient to establish a due process violation, Darden, 477 U.S. at 181. Rather, the statement must be viewed "in the context of the trial as a whole" and a determination made "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Carson, 151 Idaho 713, 718 (2011). Therefore, Abdullah's claim fails Perry's first prong.

Abdullah has also failed to establish the second prong. Presumably trial counsel did not object because it was a statement that helped the defense, focusing the jury upon the statutory aggravators that were alleged by the state and not inconsequential evidence that was presented during the guilt-phase that was related to an entirely different issue.

Finally, Abdullah has failed to establish the third prong because there is not a reasonable possibility that he would not have been sentenced to death had the statement not been made, particularly in light of the instructions given to the jury regarding the role of closing arguments as opposed to the evidence presented to the jury. (R., p.1578 (JI 1, 4, 12, 35, 58).) As explained in Carson, 151 Idaho at 721, when the prosecutor's challenged comments are placed in context and such instructions are given to the jury, "there is no indication that the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Whether reviewed in the context of whether a constitutional violation even occurred or whether any alleged error was harmless, Abdullah has failed to meet all three of Perry's fundamental error prongs. Moreover, the jury was again instructed that closing arguments are not evidence (R., p.1578 (JI 58).), and jurors are presumed to follow instructions. Joy, 155 Idaho at 7.

XIX.
Abdullah's Jury Instruction Sentencing-Phase Claims Constitute Invited Error, And He Has Failed To Meet His Burden Of Establishing Fundamental Error

A. Introduction

Abdullah challenges several of the sentencing instructions. (Brief, pp.86-90.) Not only is he raising many of his claims for the first time on appeal, but because some of the instructions given by the district court were actually submitted by him, they are invited errors and are waived.

B. Standard Of Review

The standard of review regarding jury instructions is articulated in section IV(B) above.

C. Duty To Consult/Unanimity

Abdullah contends that snippets taken from various instructions "provided an incorrect standard for jurors to assess mitigation evidence" in violation of the Eighth Amendment. (Brief, pp.86-88.) The invited error doctrine discussed in section II(C) above applies with equal force when the instruction given by the district court was offered by the defendant. Draper, 151 Idaho at 589 (quoting State v. Aragon, 107 Idaho 358, 363 (1984)) ("Appellant cannot assert as error on appeal the giving of an instruction which he himself requested."). It also applies in a capital sentencing. Dunlap, 2013 WL 4539806, *27. Jurors were instructed:

> As jurors you have a duty to discuss the case with one another and to deliberate in an effort to reach a just verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

(R., p.1578, JI 50.) With the exception of the phrase, "and unanimous verdict," Instruction 50 was identical to an instruction requested by Abdullah. (R. Supp., p.45.)

The phrase from Instruction 53, "If you find that all mitigating circumstances are sufficiently compelling to make the imposition of the death penalty unjust, or you cannot unanimously agree on that issue, then the judge must sentence the Defendant," was offered by Abdullah with the exception of the phrase, "the judge must sentence the defendant"; Abdullah's proposed instruction stated "then the defendant will be sentenced to life in prison without the possibility of parole." (R. Supp., p.48.) The same is true with respect to the phrase, "Any finding by you that the mitigating circumstances do or do not make the imposition of the death penalty unjust must be unanimous, but you do not have to unanimously agree upon what mitigating circumstances exist." (*Compare* R., p.1578 (JI 53) *with* R. Supp., p.49.) A

comparison of the last paragraph of Instruction 53 reveals it was also requested by Abdullah. (Id.) The final claim regarding Instruction 58 was also requested by Abdullah. (*Compare* R., p.1578 (JI 58) *with* R. Supp., p.45.)[28] Abdullah cannot be rewarded when the district court gave him what was requested.

Even if this Court considers Abdullah's claim, he has failed to establish fundamental error. The state recognizes jurors cannot be instructed in a manner requiring unanimity with regard to finding or considering mitigation evidence. Mills v. Maryland, 494 486 U.S. 367, 384 (1988). However, instructions must be read as a whole and not dissected into individual snippets and phrases. Johnson, 509 U.S at 367; Shackelford, 150 Idaho at 600-01. Instruction 53 explained the manner of deciding both aggravating factors and mitigation. The entirety of the mitigation instruction reads:

> You must each decide for yourself whether all mitigating circumstances presented, when weighed against each statutory aggravating circumstance proved by the State, are sufficiently compelling to make imposition of the death penalty unjust. Any finding by you that the mitigating circumstances do or do not make the imposition of the death penalty unjust must be unanimous, but **you do not have to unanimously agree upon what mitigating circumstances exist**. The existence of mitigating circumstances need not be proven beyond a reasonable doubt. **You must each decide for yourself whether mitigating circumstances exist** and, if so, then consider them in your individual weighing process.

(R., p.1578, JI 53) (emphasis added).

Twice the jury was instructed that the existence of mitigating circumstances did not need to be unanimous, but was an individual determination. It is difficult to imagine a clearer instruction, particularly when the verdict form is examined and did not have a "check off" for the existence of mitigating circumstances, but merely a "weighing check off." (R., p.1578, JI 55.)

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[28] The phrase "consider each other's views, and deliberate with the objective of reaching an agreement" (Brief, p.87), was not given during penalty-phase instructions, but only during guilt-phase (R., p.1578, JI 35.)

Mills and its progeny require no more, and it does not prevent the ultimate weighing – whether the collective mitigation is sufficiently compelling to make imposition of the death penalty unjust – from being unanimous to impose the death penalty or prevent jurors from "consulting" with one another regarding any aspect of their deliberation.

Finally, Abdullah has failed to establish any alleged error was not harmless. Contrary to Abdullah's claim, it is his burden under Perry's third prong to establish any alleged error was not harmless. Dunlap, 2013 WL 4539806, *8. Even under Mills, the Supreme Court did not review the claim as "structural error," but examined whether there was a "substantial possibility that the jury may have rested its verdict on the 'improper' ground." 486 U.S. at 377.

D. Definition Of "Many"

Abdullah contends, "the definition of 'many persons' was too narrow" because the district court instructed it means "more than four persons." (Brief, p.88) (citing R., p.1578, JI 47). Not only did Abdullah fail to raise this claim before the district court and must establish fundamental error, but the alleged error is invited because it was given at his request. While not submitted with the original package of instructions, counsel advised the court he "had a number" with respect to "many." (Tr., Vol.VII, p.488.) Abdullah then submitted an instruction expressly requesting that "many" be defined as "more than four people" (R. Supp., p.56), which was noted by the district court during the penalty-phase instruction conference, discussed extensively (Tr., Vol.VIII, pp.283-85), and ultimately adopted by the court (R., p.1578 (JI 47)). Abdullah is not entitled to benefit from alleged instructional error when he asked that the instruction be given.

Moreover, Abdullah has failed to demonstrate fundamental error. Abdullah's argument is basically a regurgitation of his contention that the great harm aggravator is unconstitutionally vague, which the state addressed in section XV(E) above and is incorporated herein.

E. "Sufficiently Compelling"

Abdullah next contends the instructions were deficient because "sufficiently compelling" was not further defined. (Brief, pp.88-89.) Not only has Abdullah failed to establish fundamental error because he failed to object to the instruction below, but like his prior jury instruction claims, any alleged error is invited because he provided the instruction. Additionally, this claim was rejected in Dunlap, 2012 WL 4539806, *10, "because the phrase is comprised of ordinary words that do not require definition."

Abdullah further complains the instructions failed to require that the collective mitigation be weighed against statutory aggravators individually. (Brief, pp.88-89.) Abdullah is wrong. Instruction 39 expressly states, "If you unanimously decide that the state has so proven one or more statutory aggravating circumstances, then you must decide whether the imposition of the death penalty would be unjust by weighing **all mitigating circumstances** against **each statutory aggravating circumstance** that has been proven." (R., p.1578, JI 39) (emphasis added). Instruction 53 further instructed:

> You must each decide for yourself whether **all mitigating circumstances** presented, when weighed against **each statutory aggravating circumstance** proved by the State, are sufficiently compelling to make the imposition of the death penalty unjust.
>
> ****
>
> Once you have reached a unanimous decision on whether **all mitigating circumstances**, when weighed against **each aggravating circumstance**, make the imposition of the death penalty unjust, or have concluded that you are unable to reach a unanimous decision on that issue, so indicate on the verdict form and notify the bailiff that you are done.

(R., p.1478, JI 53) (emphasis added).

Abdullah's claim is without merit because the jury was properly instructed under State v. Charboneau, 116 Idaho 129, 153 (1989), which requires the collective mitigation to be weighed

against individual statutory aggravators. Finally, Abdullah has not met his burden of establishing any alleged error was not harmless, and as detailed above, his argument regarding structural error is without merit.

F. Specific Sentence

Abdullah contends the instructions failed to comply with I.C. § 19-2515(7), which requires the jury to be instructed regarding potential penalties if the death penalty is not imposed. (Brief, pp.89-90.) Any alleged error was invited, and Abdullah has failed to establish fundamental error.

Although Abdullah initially submitted instructions with the requisite language from I.C. § 19-2515(7) (R. Supp., p.48), he abandoned his proposed instruction in this area and requested the phrase, "the judge will sentence the defendant" (Tr., Vol.VIII, p.398). After further discussion between the parties and the court, Abdullah reiterated his request, stating, "The defense reasserts its prior position, which is that the sentence end with the judge will sentence the defendant." (Id., p.400.) At the final instruction conference, Abdullah reasserted his position that the instruction read, "the judge must sentence the defendant." (Id., pp.471-72.) Apparently, counsels' concern was that Abdullah was not subject to a fixed life sentence if the jury found a statutory aggravating factor but concluded it was outweighed by the mitigation or were undecided on the weighing question, *see* I.C. § 19-2515(7), because the new "fixed life sentence" for statutory aggravating factors was not enacted until February 13, 2003, well after he murdered Angie. *See* 2003 Idaho Sess. Laws, ch. 18, pp.70-76. Regardless, "[Abdullah] cannot now be heard to denounce [instructions] that he roused. This constitutes invited error." Dunlap, 2013 WL 4539806, *27 (quotes and citations omitted).

Finally, Abdullah cannot establish any of the three Perry prongs because his claim is based upon a statutory rule and not a constitutional violation. However, even if construed as a constitutional violation, his claim is unavailing because the relevant statute was inapplicable since he was not subject to a fixed life sentence if the jury found a statutory aggravator but could not decide whether the mitigation made imposition of the death penalty unjust. He has also failed to establish any alleged error was not harmless.

G. Independent Evidence For Each Statutory Aggravator

In Osborn, 102 Idaho at 418-19, this Court recognized identical evidence might be used to establish multiple statutory aggravators and, because the Court presumed the legislature did not intend to "duplicate enumerated circumstances," concluded when multiple aggravators are found they must be supported by additional evidence. *See also* Wood, 132 Idaho at 104 ("the sentencing judge may consider the same evidence he considered in relation to a different aggravator so long as he finds additional aggravating evidence to support a finding of that particular aggravator"). To comply with this mandate, the district court instructed the jury, "In determining whether a certain aggravating circumstance exists, you may consider the same evidence you considered to support a different aggravator so long as you find additional aggravating evidence to support a finding of that particular aggravator beyond a reasonable doubt" (R., p.1578, JI 53), which was modified and given at Abdullah's request (Tr., Vol.VIII, pp.464-466, 472-73). Therefore, any error is invited and cannot be addressed by this Court.

Abdullah has also failed to establish fundamental error because the instruction is not unduly confusing and he has failed to establish a reasonable likelihood the jury applied the instruction in a way that violates the Constitution. Abdullah has also failed to establish any alleged error was not harmless "[b]ecause [both] aggravators [were] supported by the entirety of

the evidence [and] at least one remains unaffected by the failure to give the required instruction." Dunlap, 2013 WL 4539806, *10.

Finally, Abdullah's allegation that the district court should have required the jury to "identify the evidence it was relying upon for each [aggravator]" (Brief, p.90), is nothing more than an implied contention that juries are required to complete written findings, an allegation rejected by this Court in Dunlap, 2013 WL 4539806, *11.

The alleged errors Dunlap raises regarding sentencing-phase jury instructions are invited and/or he has failed to establish fundamental error, which is his burden because of his failure to make timely objections regarding the instructions before the district court.

XX.
The District Court's Limitations On Abdullah's Allocution Did Not Violate His Due Process Rights

A. Introduction

Abdullah contends his right to due process was violated because the district court imposed unreasonable restrictions on the scope of his allocution by prohibiting him from making "factual statements if he chose to allocute." (Brief, p.90.)

B. Standard Of Review

To the extent this is a constitutional claim, it is subject to free review by this Court. Weber, 140 Idaho at 91.

C. Abdullah Must Establish Fundamental Error

The issue surrounding Abdullah's allocution was first raised by the district court at the conclusion of the penalty-phase jury instruction conference wherein the court explained federal circuits have concluded it is not a constitutional right but Idaho may have concluded otherwise. (Tr., Vol.VIII, pp.402-03.) The issue was again addressed the following morning with Abdullah

personally expressing his desire to allocute and the parties presenting their respective arguments with the state expressing concern regarding the content of his allocution, particularly his apparent desire to talk about guilt-phase issues. (Id., pp.410-20.) When the court asked about the content of Abdullah's allocution, counsel explained he wanted to discuss "his side of the story concerning some of the details of the case," including "his association with [Steven] Bankhead" (id., p.416), who was a sentencing witness (id., pp.223-59). The court interrupted and explained, "This isn't an opportunity for him to testify. If he wants to testify, he's going to take an oath and be subject to cross-examination. He is not going to take this opportunity to attack the testimony of another witness." (Id.) Counsel continued, "Basically bring mitigating circumstances to the attention of the jury, explaining to a point his conduct, perhaps some apologies." (Id.) The court explained, "[I]t is beginning to sound more like this isn't really an allocution. This is his attempt to testify before the jury ... without being subject to cross-examination.... If he wants to testify, he can testify. An allocution generally is not along the lines of here's my side of the story." (Id., p.417.) The court concluded by explaining there is no constitutional right to allocute, but that pursuant to I.C.R. 33(a)(1), Abdullah would be permitted to allocute, but not testify regarding guilt-phase evidence. (Id., pp.417-20.)

After another recess, the court reiterated its belief that Abdullah "has the right to address the jury," but it "is limited to mitigation of punishment and the exercise of that right may be limited as to duration and content by the Court." (Id., p.420.) The court "warned" Abdullah that it could be used against him at future proceedings, advised that the jury would be instructed regarding the purpose of an allocution, and concluded by reaffirming, "The purpose of allocution is essentially to allow the defendant to plead for mercy.... It's not the purpose of allocution to allow him -- in essence to testify as to factual matters." (Id., p.421.) Counsel then explained:

> Abdullah wants to talk about how much his family means to him, his love and respect for his family, the -- I guess some overseas trips, explain some overseas trips that he made, the support that his family received from other members of the family, his thoughts and feelings throughout this process, and relationships. Not challenging any factual statements made by [] Bankhead, but the nature of his relations with him.

(Id., p.423.) The court explained that statements regarding Bankhead would not be permitted. (Id., p.423). Ultimately, the court determined the state would be permitted to object "if [Abdullah] starts getting off into factual thing[s]." (Id., p.425.) Counsel then advised Abdullah may want to testify. (Id., p.426.) The court explained the defense's mitigation could be reopened if that was his choice, but not as to guilt. (Id., pp.427-29.)

After another recess, the court had a colloquy with Abdullah, wherein he complained he never wanted to waive his right to testify during guilt-phase; the court also explained the difference between testifying and allocuting, with Abdullah concluding he wanted to testify. (Id., pp.429-38.) After another recess, the court continued the colloquy, with Abdullah refusing to answer whether he desired to testify by stating, "you just do what you have to do," resulting in the court concluding he waived his right to testify. (Tr., pp.438-42.)

At the conclusion of the VIS, Abdullah asserted he desired to allocute. (Id., p.457.) Because of the colloquy with Abdullah, the court advised it would have to be written and provided to counsel before being presented to the jury; no objection was lodged by either party. (Id., pp.458-59.) After the jury instruction conference and another recess, Abdullah informed the court he was not going to allocute because "I'm not allowed to say anything about the trial or my thinking or my feelings and everything else has been mentioned already." (Id., pp.485-86.) Responding, the court explained:

> The only thing the Court has prevented you from talking about is your wife's wishes toward her family, which is simply not proper mitigation at all. Furthermore, what happened in the trial could be the subject of an appeal, but is

> not relevant and not something that the jury has any business making a decision about. So it is not relevant to mitigation. That's the reason the court has excluded those two items. They have nothing to do with the decision of punishment.

(Id., p.486.) Regarding statements of fact involving Bankhead, the court explained Abdullah would have to testify and be subject to cross-examination. (Id.) After again being told the purpose of allocution, Abdullah waived his right to allocute. (Id., pp.486-88). The court subsequently entered a written opinion regarding Abdullah's waiver (R., pp.1512-21), which the state adopts in total and has attached as Appendix A.

As recently recognized in State v. Hansen, 154 Idaho 882, 886 (Ct. App. 2013), the failure to permit a defendant to allocute does not rise to the level of a constitutional violation because the "right" to allocute is based, in Idaho, upon I.C.R. 33(1)(a) and not the federal or state constitutions. *See also* Hill v. U.S., 368 U.S. 424, 428 (1962) (allocution is "not a fundamental defect which inherently results in a complete miscarriage of justice"); State v. Nez, 130 Idaho 950, 958, (Ct. App. 1997) (recognizing the Supreme Court "has not yet expressly recognized a constitutional basis for the right of allocution" (citing McGautha v. California, 402 U.S. 183, 217 (1971). On this basis alone, Abdullah's claim fails because, to establish Perry's first prong, he must raise a constitutional violation, which he does not contend exists, particularly before a jury. And he has certainly failed to establish Perry's second and third prongs, particularly since he makes no argument whatsoever "that there is a reasonable possibility that [he] would not have been sentenced to death" if he had allocuted. Dunlap, 2013 WL 4539806, *8.

However, even if his claim is not reviewed under the fundamental error doctrine, it fails. Idaho Criminal Rule 33(a)(1) permits a defendant "to make a statement and to present any information in mitigation of punishment." As explained in State v. Goodrich, 97 Idaho 472, 479 (1976), I.C.R. 33(a)(1) only permits "information in mitigation of punishment." As detailed

above, Abdullah's proposed statement was not "information in mitigation of punishment," but information to rebut guilt-phase evidence presented by the state and Bankhead's sentencing testimony. While mitigation may be fairly broad, State v. Small, 107 Idaho 504, 506 (1984), it does not include evidence regarding guilt, which "was decided by the jury, and need not be considered in the penalty phase determination." Hairston, 133 Idaho at 517. As explained by the district court, numerous courts have recognized the "right" to allocute is not without limitation, particularly if it includes statements to rebut evidence presented by the state in either guilt or sentencing phases without being subjected to cross-examination before a jury in a capital case.

Even if it is the state's burden to demonstrate harmless error, it has been met. Abdullah was given a death sentence because of the brutal nature of Angie's murder and the circumstances surrounding her murder, particularly his knowingly creating a great risk to many other individuals. Extensive mitigation was presented; nevertheless, the jury concluded it did not make imposition of the death penalty unjust. Considering the nature of his proposed allocution, it is probable Abdullah would have alienated the jury further resulting in an ineffective assistance of counsel claim because it was not properly tailored to conform with I.C.R. 33(a)(1). *See* Dunlap, 2013 WL 4539805, *37.

XXI.
Based Upon Abdullah's Failure To Demonstrate Any Sentencing Error, His Claim Of Cumulative Error Necessarily Fails

Abdullah contends if any of the errors alleged above are harmless, under the "cumulative error doctrine" this Court should reverse his death sentence. (Brief, p.93.) "When there is an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, the errors show the absence of a fair trial, the cumulative error doctrine requires a reversal of the conviction as the trial has contravened the defendant's right to due process." Payne, 146 Idaho at

568 (quotes and citation omitted). Because Dunlap has failed to demonstrate error, let alone an aggregate of harmless errors, this Court cannot reverse based on the cumulative error doctrine, particularly since many alleged errors are being raised for the first time on appeal.

XXII.
Abdullah Has Failed To Establish The District Court Abused Its Discretion By Denying His Request To Obtain The Underlying Data Supporting Dr. Colucci's Testimony

A. Introduction

Abdullah contends the district court abused its discretion by denying his request to have gas samples sent to his post-conviction "expert" for testing and denying his request for the "underlying data" used by Dr. Colucci, which is "proprietary" and would not be shared by Dr. Colucci. (Brief, pp.97-101.) Because the district court denied Abdullah's request to have the gas samples sent to his post-conviction "expert" without prejudice and Abdullah expressly stated he no longer required testing, but wanted only the underlying proprietary data, he has failed to establish the court abused its discretion regarding any "retesting." Because of the proprietary nature of the underlying data, the lack of relevance associated with that data to post-conviction proceedings, and Abdullah's expert's lack of qualifications, the district court did not abuse its discretion by denying the requests for the underlying data.

B. Standard Of Review

"The decision to authorize discovery during post-conviction relief is a matter left to the sound discretion of the district court." Hall v. State, 151 Idaho 42, 45 (2011) (quotes and citation omitted).

C. The District Court Did Not Abuse Its Discretion

After filing his initial amended petition (UPCPA, R., pp.178-345) with multiple attachments, including an affidavit from John J. Lentini, an "arson expert," challenging some of

the testimony of Dr. Colucci (id., pp.832-39), on September 5, 2007, Abdullah filed a 22-page Motion for Discovery requesting six depositions and a plethora of requests for production of documents (UPCPA, R., pp.918-40), including the "underlying data relied upon by [Dr.] Colucci or other Ethyl Corporation employees, to reach the conclusion [Dr.] Colucci testified to at trial" (id., p.930). After argument, the district court deferred ruling until completion of Toryanskis' depositions. (10/11/07 Tr., pp.89-91.) On October 26, 2007, Abdullah filed a motion requesting shipment of various exhibits to Lentini. (UPCPA, R., pp.1072-74.) Abdullah conceded Lentini was aware "there are some companies and some scientists who will not provide the underlying data so you have no idea whether or not their analysis is correct because it is proprietary in nature so they're unwilling to turn that information over." (12/13/07 Tr., p.141.) Abdullah further conceded, "Some of the data is actually proprietary. That has been a problem in the past." (Id., p.150.) After noting Dr. Colucci was not an "arson expert" and the deficiencies in Lentini's qualifications (id., pp.146-47), the district court denied the motion without prejudice, concluding the request for retesting was merely a "fishing expedition" and Abdullah had failed to explain how retesting "is necessary and how that really goes to ineffective assistance of counsel" (id., pp.147, 151); it is unclear whether the court also denied without prejudice the request for Dr. Colucci's underlying data or deferred that decision until depositions were completed.

After filing his Final Amended Petition (id., pp.1736-2082), which included Lentini's affidavit with some attachments (id., pp.4375-392), Abdullah filed a Renewed and Supplemental Motion for Discovery (id., pp.5558-85), which included a request "for all documents relating to the chain of custody of the samples received and tested by [Dr.] Colucci, or other employees of Ethyl Corporation, as well as copies of a full report from Ethyl Corporation, including any underlying data relied upon by [Dr.] Colucci or other Ethyl employees" "to reach the conclusion

[Dr.] Colucci testified to at trial" and to transfer samples of the gas evidence found in the driveway and 7-11 in Salt Lake to Lentini for analysis (id., p.5579). During oral argument, Abdullah limited his request, stating, "I'm not asking for further testing.... We are not going to ask the Court to allow us to transfer the evidence at this point. We'd just like to see the underlying data." (1/9/09 Tr., p.70.) Abdullah's counsel contended it was unknown whether the underlying data was proprietary and recognized, "it certainly would make a difference in the way I perceive that request." (Id., p.72.) Pursuant to Abdullah's request (id., pp.73-74), the state inquired of Dr. Colucci and found the "content/make-up of the additive is proprietary and it is important for business purposes that the information does not become public knowledge." (UPCPA, R., p.5800). Abdullah filed another request for discovery requesting additional information allegedly given to the state regarding Dr. Colucci's testing. (Id., pp.5803-06.) While it is unclear whether the court addressed this motion, Abdullah renewed his request for the underlying data (id., pp.6851-57), which the court denied because it was proprietary information and the data was not particularly relevant because Dr. Colucci invented the additive that was found (7/28/10 Tr., pp.6-12). Abdullah next filed a motion seeking clarification of the court's ruling (UPCPA, R., pp.7729-31), which was rejected because "Dr. Colucci is the only person who knows what this marker is. It is a proprietary marker. It is not something that you can look in the general literature to review" and Abdullah did not have an expert "who has the requisite knowledge or ability to find this marker. Therefore, any attempt to look for the marker is irrelevant" (8/23/10 Tr., pp.5-6).

While post-conviction cases are civil in nature, State v. Bearshield, 104 Idaho 676, 678, (1983), the rules of discovery contained in Idaho's rules of civil procedure do not apply in post-conviction cases. I.C.R. 57(b). "When an applicant believes discovery is necessary for

acquisition of evidence to support a claim for post-conviction relief, the applicant must obtain authorization from the court to conduct discovery." Murphy v. State, 143 Idaho 139, 148, (Ct. App. 2006). Discovery is "only mandatory where [it] is necessary to protect an applicant's substantial rights." Dunlap, 2013 WL 4539806, *40. "In order to be granted discovery, a post-conviction applicant must identify the specific subject matter where discovery is requested and why discovery as to those matters is necessary to his or her application." Hall, 151 Idaho at 45 (quotes and citation omitted). Discovery standards in capital post-conviction cases are no different than non-capital cases, id. at 53, nor is there a due process violation based upon these standards, Aeschilman v. State, 132 Idaho 397, 402 (Ct. App. 1999). Post-conviction cases are "not a vehicle for unrestrained testimony or retesting of physical evidence introduced at the criminal trial." Murphy, 143 Idaho at 152.

Abdullah initially contends the district court abused its discretion by denying his request that the evidence be transferred to his expert for testing. (Brief, p.97.) However, because he withdrew his requests for transfer of the evidence and additional testing and the court ruled only on the request for the underlying data, there is no adverse ruling from which he can appeal. *See* State v. Yakovac, 145 Idaho 437, 442 (2008) ("This Court will not review a trial court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error."); State v. Barrett, 138 Idaho 290, 295 (Ct. App. 2003) (no adverse ruling when district court defers ruling). Even if there is an adverse ruling, Abdullah is requesting this Court to review the issue for the first time on appeal, which is prohibited absent a showing of fundamental error, which Abdullah has not even alleged. *See* Perry, 150 Idaho at 227. However, even if there is an adverse ruling, as in Raudebaugh v. State, 135 Idaho 602, 605,

(2001), his allegations are speculative because "[t]here is no showing that the state's testing was flawed or that there is new technology that would make current testing more reliable."

Apparently recognizing the weakness of his retesting argument, Abdullah also contends he should have been granted access to the underlying data to assess "whether the reasoning or methodology underlying the testimony [of Dr. Colucci] is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." (Brief, p.100) (quotes and citation omitted). However, Abdullah's argument is nothing more than a fishing trip. Moreover, he has never explained by what authority the district court could compel the disclosure of proprietary information from Dr. Colucci that was never given to the state. As explained in Jen-Rath Co., Inc. v. Kit Manufacturing Co., 137 Idaho 330, 336 (2002), district courts have discretion to issue protective orders barring disclosure of proprietary information. Further, Abdullah has never explained how Lentini, who was merely an "arson expert" with a Bachelor's of Science in natural sciences and a few postgraduate courses in chemistry (UPCPA, R., p.4376), would be able to find the underlying additive invented by Dr. Colucci who had a Bachelor of Science in biochemistry, a Ph.D. in organic chemistry and a "post doctoral stint" for two years. (Tr., Vol.VI, pp.669-70.) Abdullah failed to establish Lentini had any expertise in the area testified to by Dr. Colucci, particularly since Dr. Colucci invented the additive. (Id., p.673.) Additionally, the primary issue was not the underlying data, but the fact that Dr. Colucci had to test the samples twice using two different methods, which he carefully explained to the jury (id., pp.673-84), and was challenged during cross-examination (id., pp.692-95). Abdullah has never explained how the underlying proprietary data would have assisted Lentini other than to speculate that Dr. Colucci's opinions were invalid. (UPCPA, R., p.4381.) Indeed, Lentini challenges Dr. Colucci's testimony in several respects, but then merely contends, "it is very

important to analyze this information in determining the validity of Dr. Colucci's results and evaluating whether they are able to be repeated in independent laboratory testing." (UPCPA, R., p.4381.) In other words, Lentini is merely guessing that Dr. Colucci's results are invalid because Lentini is allegedly unable to replicate the testing without the proprietary data. However, the key evidence regarding the gas was not Dr. Colucci's testimony, but the receipt establishing Abdullah purchased gas at the 7-11 in Salt Lake, which involved more gas than could have been put in his gas tank. Abdullah's request for the underlying proprietary data was nothing more than a fishing expedition, which the district court properly denied. *See* Murphy, 143 Idaho at 148 ("'Fishing expedition' discovery should not be allowed. The UPCPA provides a forum for known grievances, not an opportunity to research for grievances.").

Relying upon I.C. § 19-4907(a) and the fact the district court conducted an evidentiary hearing, Abdullah contends the rationale for limiting discovery in post-conviction cases "was significantly minimized" and there should be no discovery limitations. (Brief, p.101.) The state recognizes I.C. § 19-4907(a), states, "All rules and statutes applicable in civil proceedings including pre-trial, discovery and appellate procedures are available to the parties." However, I.C.R. 57(b) states, "the provision for discovery in the Idaho Rules of Civil Procedure shall not apply to the proceedings unless and only to the extent ordered by the trial court." Clearly, an evidentiary hearing is part of "the proceedings" of a post-conviction case and, therefore, discovery issues are still governed by I.C.R. 57(b). There is no conflict between I.C.R. 57(b) and I.C. § 19-4907(a); discovery is available to the parties when it has been approved by the trial court. *See* State v. Johnson, 145 Idaho 970, 974 (2008) ("When a statute and rule can be reasonably interpreted so that there is no conflict between them, they should be so interpreted rather than interpreted in a way that results in a conflict.") (internal quotes and citation omitted).

However, if there is a conflict between I.C.R. 57(b) and I.C. § 19-4907(a), because post-conviction discovery is a "practice and procedure pertain[ing] to the essential mechanical operations of the courts by which substantive law, rights, and remedies are effectuated" and does not "prescribe[] norms for societal conduct and punishments for violations thereof," the conflict is procedural and I.C.R. 57(b) governs. Id. Moreover, as demonstrated by this case and the voluminous discovery that was requested and conducted even though there was an evidentiary hearing, the potential for abuse of process has not been minimized because there are no "disincentives against unfettered discovery" in post-conviction cases irrespective of whether there is an evidentiary hearing. *See* Aeschilman, 132 Idaho at 402. There is still "little if any financial disincentive from engaging in unlimited discovery because an applicant for post-conviction relief is usually indigent and proceeds *pro se* or is appointed counsel" and "sanctions for discovery abuses are, for the most part, impractical." Id.

The district court repeatedly perceived this issue as discretionary, acted within the outer boundaries of that discretion and consistently with the applicable legal standards, and reached its discretion by an exercise of reason. *See* Hedger, 115 Idaho at 600. Abdullah has failed to establish an abuse of discretion.

XXIII.
Abdullah Has Failed To Establish Fundamental Error Based Upon The Destruction Of Counsels' Jury Questionnaire Forms

A. Introduction

Abdullah contends he was denied due process and meaningful appellate review because the district court ordered the return of the jury questionnaire forms after jury selection, which were destroyed and not preserved for appeal. (Brief, pp.101-03.) Because Abdullah failed to

object to returning the forms even though it was known they would be destroyed, his claim is reviewed under fundamental error and fails because he has not established Perry's three prongs.

B. Standard Of Review

"In applying constitutional standards to the facts found, our review of a claim of due process violation is one of free review." Gray, 129 Idaho at 796.

C. Abdullah Has Failed To Establish Fundamental Error

Prior to jury selection, the parties and the veniremen were advised all copies of the completed juror questionnaire forms would be returned to the district court and only one copy would be retained for court records while all others would be destroyed. (Tr., Vol.I, pp.626, 642, 651; Vol.III, p.827.) Abdullah did not object to returning copies of the questionnaires or their destruction. Kim testified she returned her copies of the questionnaires and they had handwritten notes regarding particular jurors. (UPCPA, Tr., pp.121, 588-90.) However, trial counsel also completed an elaborate "Preempt Matrix" (UPCPA Exhibit D) containing "a synthesis or summary of a number of notes [counsel] made on the jury selection questions" (UPCPA, Tr., p.495) that was utilized to ascertain which veniremen should be removed (id., p.498).

Relying upon I.A.R. 28(b)(2)(O), Abdullah contends the questionnaires with counsels' notes are part of the underlying record and should have been preserved for appeal. (Brief, pp.102-03.) Rule 28(b)(2)(O) states, "The clerk's or agency's record shall automatically include the following pleadings and documents . . . (O) In criminal appeals in which the death penalty was imposed, all documents in the trial court file of every nature, kind and description." There is no evidence establishing the returned questionnaires were ever "in the trial court file." As explained by the district court, the returned questionnaires were to be destroyed. There cannot be a constitutional violation if there was not a violation of the rule. *See* Rogers v.

Commonwealth, 2009 WL 2742563, *7 (Va. Ct. App. 2009) (unpublished) (rejecting the contention that questionnaires are part of the record on appeal because they were "neither filed with nor lodged with the clerk to be maintained as a part of the record"). Likewise, I.A.R. 25(d) does not salvage Abdullah's claim because it governs only which transcripts are part of the "standard transcript" in capital cases. Additionally, I.C.A.R. 38 applies only to "court records" and exhibits. Abdullah has not cited a case establishing copies of juror questionnaires with counsels' notes constitute court records or exhibits, particularly since the questionnaires completed by the respective veniremen were retained by the court.

In In re Matter of C.H., 2013 WL 5006695, *4 (Tex. Ct. App. 2013), the court rejected the contention that a defendant was entitled to a new trial when the jury questionnaires were destroyed because "[j]ury questionnaires are not included in the list of items required by rule 34.6 of the rules of appellate procedure" and "the record does not show that Appellant took any timely step below to ensure the jury questionnaires would be included in the trial record." In People v. Munsey, 232 P.3d 113, 122 (Col. Ct. App. 2009), the court opined, because there was no evidence destruction of juror questionnaires was done in "bad faith," there was no due process violation. The court recognized a loss of a portion of the trial record did not require reversal unless it could be shown "the incompleteness of the record visits a hardship upon him or her and prejudices the appeal." Id. This issue is also similar to that addressed in section IX above involving transcription of the bailiff's oath and is incorporated herein. Abdullah cannot meet that burden because the "Preempt Matrix" provided relevant information regarding counsels' thoughts on jury selection. As explained in Lovelace, 140 Idaho at 65 (emphasis in original), merely because "unrecorded proceedings *probably* dealt with appealable issues" does not establish a constitutional violation, which is also true with the destroyed questionnaires.

Because there is no statutory or constitutional right requiring preservation of counsels' copies of the questionnaires, Abdullah cannot establish the first or second Perry prongs, and based upon the "Preempt Matrix" and Toryanskis' testimony of, he has failed to meet his burden of establishing any alleged error was not harmless.

XXIV.
Abdullah Has Failed To Establish His Trial Attorneys' Performance Unreasonable And That Any Alleged Deficiency Would Have Changed The Outcome

A. Introduction

Abdullah has raised a number of IAC claims involving both guilt and sentencing. Because Abdullah has failed to establish deficient performance and prejudice, each of the IAC claims fail.[29]

B. Standard Of Review

In Charboneau v. State, 140 Idaho 789, 793, (quotes and citation omitted), this Court reaffirmed the standard of review in post-conviction cases when summary dismissal is granted:

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[29] Abdullah contends his Final Petition is "incorporated in its entirety here by reference, and it is before this Court without the need for exhaustive argument which is neither required nor desired by our appellate rules and the interests of judicial efficiency." (Brief, p.93 n.41) (quotes and citation omitted). Abdullah's reliance upon Phipps v. Phipps, 124 Idaho 775, 778 (1993), is sorely mistaken. While the state recognizes this Court noted that "exhaustive argument is neither required nor desired by our appellate rule and the interests of judicial efficiency," id. at 778, this Court has never permitted an appellant to merely incorporate by reference a prior brief or pleading, let alone a 347-page Final Petition, in asserting errors before this Court. As recently reaffirmed, "This Court will not search the record on appeal for error." Hopper v. Swinnerton, 2013 WL 6198945, *3 (2013) (quotes and citation omitted). As explained in State v. Hoisington, 104 Idaho 153, 159 (1983) (quotes and citation omitted), "I.A.R. 35 requires that issues and arguments thereon be presented in the parties' briefs. This Court has consistently followed the rule that it will not review the actions of a district court which have not been specifically assigned as error, especially where there are no authorities cited nor argument contained in the briefs upon the question." While it is unclear whether Abdullah is attempting to raise every claim before this Court that was raised before the district court by merely "referencing" the Final Petition, this tactic cannot be tolerated and should be expressly rejected by this Court to avoid any possibility of confusion should Abdullah ever file a federal habeas petition and rely upon the "reference" to argue all the claims in his Final Petition have been fairly presented to this Court.

> In determining whether a motion for summary disposition is properly granted, a court must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief if accepted as true. A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions. The standard to be applied to a trial court's determination that no material issue of fact exists is the same type of determination as in a summary judgment proceeding.

In Dunlap v. State, 141 Idaho 50, 56 (1998) (citations omitted), this Court reaffirmed the standard of review in post-conviction cases when an evidentiary hearing is conducted:

> Post-conviction proceedings are civil in nature and therefore the applicant must prove the allegations by a preponderance of the evidence. On review, the appellate court will not disturb the lower court's factual findings unless the factual findings are clearly erroneous. The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are matters solely within the province of the district court. When reviewing mixed questions of law and fact, this Court will defer to the factual findings of the district judge unless those findings are clearly erroneous. This Court exercises free review of the district court's application of the relevant law to the facts.

C. Standards Of Law Regarding Ineffective Assistance Of Counsel

The standard in determining whether counsel has provided effective assistance of counsel remains the test articulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), which has been adopted in Idaho. Dunlap, 2013 WL 4539806 *32. The purpose of effective assistance of counsel "is not to improve on the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial." Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011) (quotes and citation omitted). To prevail on an IAC claim, Abdullah must show counsels' representation was deficient and that the deficiency was prejudicial. Strickland, 466 U.S. at 687.

The first element "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. In making this determination, there is a strong presumption that counsel's performance fell within the "wide range of professional assistance." Id. at 689. Abdullah has the burden of showing

counsel's performance "fell below an objective standard of reasonableness." Id. at 688. The effectiveness of counsel's performance must be evaluated from his perspective at the time of the alleged error, not with twenty-twenty hindsight. Id. at 689. "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." Harrington v. Richter, 131 S.Ct. 770, 788 (2011) (quotes and citation omitted). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Richter, 131 S.Ct. at 788 (quotes and citation omitted).

Strategic and tactical choices are "virtually unchallengeable" if made after thorough investigation of the law and facts. Strickland, 466 U.S. at 690-91. Strategic choices made after less than complete investigation are unchallengeable if "reasonable professional judgments support the limitations on investigation." Id. "Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach." Richter, 131 S.Ct. at 789 (quotes and citation omitted). Counsel can develop a strategy that was reasonable at the time and "balance limited resources in accord with effective trial tactics and strategies." Id.

The second element requires Abdullah show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This requires Abdullah to demonstrate "a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome," id. at 694, which "requires a substantial, not just conceivable, likelihood of a different result," Pinholster, 131 S.Ct. at 1403 (quotes and citation omitted). A reviewing court "must consider the totality of the evidence before the judge or jury," Strickland, 466 U.S. at 695, and reweigh that evidence "against the totality of available mitigating evidence," Pinholster, 131 S.Ct. at 1408 (quotes and citation omitted).

Overcoming Strickland's "high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). Because IAC claims provide a means to raise issues not presented at trial, the Strickland standard "must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve." Richter, 131 S.Ct. at 788 (quotes and citation omitted). The reviewing court need not address both prongs of Strickland if an insufficient showing is made under only one prong. Strickland, 466 U.S. at 697.

D. The District Court Applied Correct Standards

Abdullah initially contends the district court applied an incorrect standard by applying a "preponderance of the evidence standard" in assessing prejudice and allegedly rejecting ABA Guidelines "as a starting point for evaluating the reasonableness of counsel's performance." (Brief, pp.96-97) (emphasis omitted). From a 231-page opinion, Abdullah has snatched two snippets where the district court concluded, "The petitioner must still prove by a preponderance of the evidence a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" and, "[i]n other words, he does not prove by a preponderance of the evidence a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (UPCPA, R., pp.8431, 8445)

(quotes, citations, emphasis omitted). The state recognizes that in Strickland, 466 U.S. at 693, the Supreme Court rejected a prejudice test for IAC that required the defendant "show that counsel's deficient conduct more likely than not altered the outcome of the trial." However, in context and reading the district court's opinion as a whole, it is clear the court understood the appropriate prejudice standard. In its first paragraph addressing the IAC claims, the court cited Strickland's prejudice test as follows, "there is a reasonable probability that, but for counsel's errors, the result would have been different." (UPCPA, R., p.8429.) The prejudice standard was reiterated on the following page by citing Gilpin-Grubb v. State, 138 Idaho 76, 81 (2002) (id., p.8430), and the third page by citing Richter, 131 S.Ct. at 792 (id., p.8431). Indeed, the court's opinion is replete with references and citations to the correct standard, and merely because Abdullah found two snippets does not mean the court applied an incorrect standard.

Indeed, this challenge was rejected in Holland v. Jackson, 542 U.S. 649, 654-55 (2004), which also involved a defendant relying upon snippets to assert the trial court applied an incorrect standard. The Court rebuked the Sixth Circuit explaining the trial court's use of the preponderance of evidence phrase must be read in context and that the court's use of the statement was "reasonably read as addressing the general burden of proof in postconviction proceedings with regard to factual contentions-for example, those relating to whether defense counsel's performance was deficient." Id. at 654. The Court also explained the word, "probably," is "permissible shorthand when the complete *Strickland* standard is elsewhere recited." Id. at 655. Finally, the Court chastised the Sixth Circuit, explaining, "Readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." The district court clearly knew and followed the appropriate law regarding the Strickland standard. In Charles v. Stephens, 2013 WL 6062528, *10 (5th Cir. 2013), the court recognized

all that is required is citation to cases that cite the correct standard. Moreover, while there is a "difference between *Strickland*'s prejudice standard and a more-probable-than-not standard," it is "slight and matters only in the rarest case." Richter, 131 S.Ct. at 792. Finally, even if the district court applied an incorrect standard, remand is not required since there is no bar preventing this Court from applying the correct standard without reference to the preponderance standard required to prove a post-conviction case.

Abdullah next contends the district court improperly "rejected" and "refus[ed] to consider" ABA Guidelines, which, according to Abdullah, "is contrary to established Idaho and United State Supreme Court precedent." (Brief, p.97.) Abdullah's allegation is false because the district court did not "reject" or "refuse to consider" ABA Guidelines, but merely recognized the Supreme Court "has made it clear that the ABA Guidelines do not set the standard for effective representation; **they are one factor to be weighed by the Court.**" (UPCPA, R., p.8434) (emphasis added). Indeed, while the district court opined the Guidelines were "one factor to be weighed," the court was not required to even consider such guidelines. As explained in Pinholster, 131 S.Ct. at 1406 (quotes and citations omitted), "Beyond the general requirement of reasonableness, specific guidelines are not appropriate. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions." In Monteja v. Louisiana, 556 U.S. 778, 790 (2009), the Supreme Court examined ABA Model Rules of Professional Conduct and recognized, "the Constitution does not codify the ABA's Model Rules." Finally, in Porter, 130 Idaho at 782, this Court declined the "invitation to adopt these guidelines." There is no basis for vacating the district court's order based upon the allegation that incorrect standards were applied.

E. Removal Of A Letter From The Scene By Cahill's Investigator And Its Admission By Stipulation At Trial

1. Introduction And Relevant Facts

At trial, Cahill's investigator, Glen Elam, testified he went to the house to "examine the fire scene before [it] was to be destroyed" and found a letter written by Angie to Abdullah "between . . . some kind of dresser and a trash can" in the master bedroom. (Tr., Vol.VII, pp.499-501, 505.) The letter discussed how Angie was "devastated" by Abdullah's "behavior," and concluded by stating, "I will not tolerate more lies and deceit. I will not forgive anymore. I am finished. There is nothing left for you in my heart." (R., p.1586, Exhibit 144a.) The letter was brought to the court's attention with the state's response to a motion to suppress unassociated with the letter. (R., pp.568-72.) The court initially concluded it was "not ruling on whether either of these items will ultimately be admissible because there are significant foundation issues that the State's going to have to overcome." (Tr., Vol.I, p.446.) The court explained the letter was relevant and the probative value of the letter was not outweighed by the danger of unfair prejudice. (Id.) Pursuant to a stipulation, a redacted version of the letter was admitted and read to the jury to establish Angie's state of mind and rebut the allegation she committed suicide. (Tr., Vol.VII, pp.501-04; R., p.1586, Exhibit 144b.)

During post-conviction proceedings, Cahill was deposed and confirmed he was with Elam at the fire scene, but could not remember if he was present when the letter was found or if he was even shown the letter at the scene; Cahill also discussed his subsequent actions regarding the letter. (UPCPA, R., pp.3769-77 (pp.36-67).) There was no discussion regarding whether the letter should have been left at the scene because Cahill did not have "anything to with it." (Id. (pp.46-47).) Cahill "probably" read the letter the "following Monday," but "perceived it as potential evidence," did some "research on what our obligations were as to whether we had to

turn it over," and turned the letter over to Detective Littlefield. (Id. (pp.47-48).) While Cahill explained consideration was given to disclosing the letter to the district court for an *in camera* review, he could not remember why that was not completed. (Id., pp.3776-77 (pp.64-65).)

Abdullah raises three IAC claims stemming from Elam's discovery of the letter, including, (1) removal of the letter; (2) Toryanskis' stipulation to admit the letter at trial; and (3) Toryanskis' failure to object to Elam's testimony that he was an investigator for Abdullah's former counsel. (Brief, pp.103-10.) Each of these claims fail because Abdullah has failed to establish deficient performance and prejudice.

2. Elam's Removal Of The Letter

Abdullah contends the district court failed to address his contention that removal of the letter from the scene by Elam constituted ineffective assistance of counsel. (Brief, p.103.) Abdullah is incorrect because the court expressly noted, "Abdullah argues that if his previous trial counsel had left the letter at the scene, then there would be no duty to disclose the fact of its discovery or its contents to the State" and explained why the letter had to be disclosed. (UPCPA, R., pp.8516-17.) As discussed in State v. Dillon, 93 Idaho 698, 710 (1970) (footnotes omitted), the privilege against self-incrimination and the attorney-client privilege apply "only to communicative and not 'real' evidence." Further, "[a]n attorney may not act as a depository for criminal evidence, and he may not suppress such evidence." Id. (footnote omitted). While Dillon involved items taken from the victim, there is no indication this principle applies only to "instrumentalities of a crime" (Brief, p.105); it applies to "criminal evidence." Dillon, 93 Idaho at 710; *see also* State v. Guthrie, 631 N.W.2d 190, 194 (S.D. 2001) (quotes and citation omitted) ("[D]efense counsel may not retain physical evidence pertaining to the crime charged."); Rubin v. State, 602 A.2d 677, 572-73 (Md. 1992) (citing cases); Commonwealth v. Stenhach, 514 A.2d

114, 119 (Pa. 1986) ("[T]he overwhelming majority of states . . . hold that physical evidence of crime in the possession of a criminal defense attorney is not subject to a privilege but must be delivered to the prosecution.").

None of the cases upon which Abdullah relies support his claim. (Brief, pp.105-06.) Clutchette v. Rushen, 770 F.2d 1469, 1470 (9th Cir. 1985), which involved receipts, not instrumentalities of a crime, is not contrary, but supports the state's position. People v. Belge, 372 N.Y.S.2d 798, 799 (N.Y. Co. Ct. 1975), is inapposite because it involves direct communication from the defendant to his attorney, which does not exist with the letter found at the scene by Elam. Likewise, People v. Meredith, 631 P.2d 46, 48 (Cal. 1981), involved the discovery of a wallet by a defense investigator after the defendant advised counsel it was in a trash can and, pursuant to counsel's request, the wallet was retrieved from where the **defendant disclosed** it would be located. The court recognized the competing interests associated with the investigator's "observation of the location of the wallet," which was the result of a privileged communication, and explained, "we cannot extend the attorney-client privilege so far that it renders evidence immune from discovery and admission merely because the defense seizes it first." Id. After balancing the interests, the court concluded, "an observation by defense counsel or his investigator, **which is the product of a privileged communication**, may not be admitted unless the defense by altering or removing physical evidence has precluded the prosecution in making the same observation." Id. (emphasis added). Elam finding the letter was not "the product of a privileged communication."

Abdullah has failed to cite any authority establishing trial counsel is ineffective when an investigator removes evidence at the crime scene that was not found as a result of a privileged communication. Based upon the absence of any law to the contrary and Cahill's research

regarding this issue, Abdullah cannot establish Cahill's performance was deficient, particularly since it was Elam who retrieved the letter on his own without anyone's involvement, and because counsel are not expected to "argue for a novel theory in an undeveloped area of law." Schoger v. State, 148 Idaho 622, 630 (2010).

Abdullah's contention regarding Cahill's failure to move for *in camera* review of the letter prior to disclosing it is also unavailing. First, because Abdullah has failed to cite any authority that such a procedure is mandated, it is waived. Zichko, 129 Idaho at 263. To the extent the claim is not waived, based upon Abdullah's failure to support the claim with any authority, it is a novel claim and cannot constitute deficient performance. *See* Schoger, 148 Idaho at 630. Finally, based upon the preceding argument and the district court's post-conviction decision, there is every indication that, even if such a procedure had been followed, the court would have ordered disclosure. "Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test." Payne, 146 Idaho at 562. Because the court would have required disclosure of the letter since it was admissible and no privilege prevented its disclosure, Abdullah has failed to establish deficient performance and prejudice as a result of Cahill's failure to seek *in camera* review.

Finally, however Abdullah construes this claim, he has failed to establish a substantial likelihood of a different result. While the redacted letter certainly contained some disparaging remarks about Abdullah, considering the overwhelming nature of the evidence detailed above, Abdullah has failed to establish the requisite prejudice associated with Cahill's handling of the letter and its ultimate admission at trial.

3. Stipulating To Admission Of The Redacted Letter

Abdullah next contends Toryanskis were ineffective by stipulating to admission of the **redacted** letter. (Brief, pp.107-08.) The decision to stipulate to admitting the redacted letter was a tactical decision and Abdullah has not even attempted to argue that decision was the result of inadequate preparation or research. *See* Dunlap, 2013 WL 4539806, *36 (counsels' decisions regarding the admission of evidence is tactical and cannot be second-guessed absent a showing of inadequate preparation, ignorance of the law, or other shortcomings capable of objective review). Presumably, Toryanskis had sufficient information to conclude the requisite foundation could be established and negotiated a stipulation resulting in the exclusion of damning information.[30] The letter itself indicates it was written by Angie after her return from Nashville during the summer preceding her murder, stating, "I was in the hospital trying to keep our baby from coming too early," "[b]efore I left for Nashville you didn't even attempt to make love to me and you knew I would be gone for a month," and "I don't want my children (including R.A.) to be raised by a hypocrite or a father with sexual problems. . . . Our children deserve more than a hypocrite for a father." (R., p.1586, Exhibit 144a.) Abdullah is R.A.'s father and Angie went to Nashville in the middle of July, returning August 15. (R., 1586, Exhibit C4; Tr., Vol.VII, pp.421-22.) Abdullah's speculation regarding why the letter was not found by police is unavailing because it is more probable the letter was overlooked by police. Additionally, as a result of the stipulation to admit a redacted version of the letter, prejudicial evidence was excluded, particularly the numerous references to Abdullah's sexual exploits and Angie's concern regarding A.H. (*Compare*, R., p.1586, Exhibit 144a *with* Exhibit 144b.)

[30] The state does not agree with the alleged foundational elements listed by Abdullah without citation to proper authority.

Arguably, the redacted letter had useful information for the defense to support the suicide theory, including the following:

> I have once again found myself devastated by you and your behavior, I felt deep in my heart after you had the Hajj our lives would be good again. I have lost all faith in that and you. I am writing you because I can't stand to hear more lies and watch you turn everything around and make it look like I am stupid and crazy.
>
> ****
>
> Before you tell me I am crazy and give me more lies, please remember, I do my homework before I confront anyone about anything. I will not tolerate more lies and deceit. I will not forgive anymore. **I am finished**. There is nothing left in my heart.

(R., p.1586, Exhibit 144b) (emphasis added). While the state argued the letter helped rebut the allegation of suicide, these phrases can certainly be interpreted to mean that Angie was a distraught, "crazy" woman, who had endured so much pain and anguish from Abdullah that she was now "finished," meaning she was going to kill herself.

Additionally, immediately before the redacted letter was read to the jury, the court read an instruction admonishing the jury "not to speculate as to what portions might have been redacted, and immediately after it was read, the court instructed the jury it was "not being offered for the truth of the matters asserted within the document. It is being offered only to show the state of mind of the decedent, and you're not to consider it for any other purpose." (Tr., Vol.VII, pp.502, 504.) It is presumed the jury followed the limiting instructions given by the court. Joy, 155 Idaho at 7.

Finally, as explained above, Abdullah was not convicted based upon the contents of the redacted letter; he was convicted because of the lies he told his attorneys, the lies he told the police, the eyewitness identifications in Salt Lake and Mountain Home, and the exhaustive physical and forensic evidence establishing he was at the house in Boise and murdered Angie.

Abdullah has failed to establish a reasonable probability he would have been acquitted even if the redacted letter had not been admitted.

4. Elam's Testimony That He Was An Investigator For Former Counsel

At the beginning of his testimony, Elam was asked, "I want to direct your attention, if I can, sir, to the date of February 14th, 2003. At that time, sir, were you acting as an investigator for former counsel for the defendant." (Tr., Vol.VII, p.499.) Elam responded, "Yes," and explained he found the letter when he went to the house "to examine the fire scene before the fire scene was to be destroyed" and. (Id., pp.499-500.)

Abdullah contends, "[v]iewed in the light most favorable to [him]," Toryanskis were ineffective by failing to object to Elam's affirmative response to the question whether he was "acting as an investigator for former counsel for the defendant" because it "implied the defense was gathering evidence against their own client, or he knew about the letter through conversations with [Abdullah], implying [Abdullah] knew of the letter and its contents" and that "counsel quit representing [Abdullah] after finding the letter because the letter led them to believe [Abdullah] was guilty." (Brief, p.109.) This claim is based upon speculation, and Elam's testimony is to the contrary. When asked the purpose for going to the house, Elam explained, "The purpose to go to the residence that day was to examine the fire scene before the scene was to be destroyed." (Tr., Vol.VII, p.500.) There was no indication the purpose was in response to information from Abdullah, rather, the it was that the defense team was being thorough in its investigation of Angie's murder and was not afraid of the contents of the letter because it could arguably support the suicide theory. During cross-examination Elam discussed the location where he found the letter and explained, "the reason I was interested in the garbage was it appeared at the fire scene that the garbage cans had not been disturbed. There were three

of them in the house that I located." (Id., p.505.) This also demonstrates Elam going to the house and finding the letter was not based upon information provided by Abdullah, but involved a thorough defense team investigation that involved finding not only the letter, but "normal household goods and items and everyday things that people throw away." (Id.)[31]

Moreover, the cases Abdullah cites are readily distinguishable because they involve the recovery of evidence as a direct result of attorney-client communications. In Stenhach, 514 S.2d at 116, the broken rifle stock used to murder the victim was found because of confidential information disclosed by the defendant at a meeting with his attorneys and investigator. Likewise, in Meredith, 631 P.2d at 48, the discovery of a wallet by a defense investigator occurred after the defendant advised counsel it was in a trash can. In People v. Nash, 313 N.W.2d 307, 314 (Mich. Ct. App. 1981), the court opined," Requiring defendant's attorney to turn in the evidence and then permitting the prosecutor to show that defendant's attorney had such evidence in his possession invites the jury to infer that defendant gave the evidence to her attorney." However, the evidence introduced in Nash was found in the defendant's attorney's office pursuant to a search warrant. 313 N.W.2d at 312. This is in stark contrast to the discovery of the letter that was found at the scene without any indication it was found based upon privileged attorney-client communications.

In Anderson v. State, 297 So.2d 871, 871 (Fla. Dist. Ct. App. 1974), after stolen property was delivered to the defendant's attorney's receptionist and later turned over to the police, an

[31] Because he had an evidentiary hearing, the state also disagrees with Abdullah's contention that summary dismissal standards should be applied to this claim and the evidence viewed in a light most favorable to Abdullah. "The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are matters solely within the province of the district court." Dunlap, 141 Idaho at 56. Irrespective, even viewing the evidence in a light most favorable to Abdullah, the inferences he asks this Court to draw are not supported by the evidence, but are nothing more than speculation.

order was obtained by the state requiring the attorney and receptionist to testify "when, how and from whom they received the allegedly stolen property." The defendant filed a petition asserting the witnesses' testimony would breach the attorney-client privilege. Id. Abdullah's case is readily distinguishable because of the manner in which the letter was found; it was not delivered to his attorneys, but found in a routine search of the crime scene. In State v. Orwell, 394 P.2d 681, 683 (Wash. 1964), the court stated, "To be protected as a privileged communication, information or objects acquired by an attorney must have been communicated or delivered by him by the client, and not merely obtained by the attorney while acting in that capacity for the client." The court assumed the attorney obtained the alleged murder weapon "as a result of information received from his client during their conference." Id. Based upon Elam's testimony, no such assumption or inference is appropriate in this case. This is a case where Elam, acting in his capacity as Abdullah's investigator, located the letter during a routine search of the premises, not as a result of attorney-client communications.

Finally, even if Abdullah established deficient performance stemming from Toryanskis' failure to object to the information that Elam was "acting as an investigator for former counsel for the defendant," based upon the overwhelming evidence of his guilt and the *de minimus* value of this single phrase, Abdullah has failed to establish that had Toryanskis objected there is a reasonable probability he would have been acquitted.

F. Preparation And Presentation Of Mitigation

1. Introduction

It appears Abdullah raises the following claims regarding Toryanskis' preparation and presentation of mitigation evidence: (1) timing of the mitigation investigation; (2) failing to investigate, prepare, and present mitigation through Abdullah's family members that would have

"humanized" Abdullah; and (3) failing to retain a cultural expert that had sufficient background and experience to explain the "Kurdish experience." (Brief, pp.110-26.) Abdullah's claims fail because Toryanskis were not even required to retain a mitigation expert and the investigation that was completed was well within constitutional mandates, the additional "humanizing" evidence was cumulative, and Toryanskis retained a cultural expert that testified extensively regarding the issues associated with the "Kurdish experience." More importantly, even with the additional mitigation evidence unearthed by the SAPD after years of additional investigation and exhaustive state resources, Abdullah has failed to establish a reasonable probability that the outcome of his sentence would have changed.

2. Standards Regarding Investigation And Presentation Of Mitigation

In Strickland, 466 U.S. at 691, the Court discussed counsels' duty to conduct a reasonable investigation, explaining, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." In Burger v. Kemp, 483 U.S. 776, 794 (1987) (quote and citation omitted), the Court explained, merely because counsel "could . . . have made a more thorough investigation than he did," does not mandate relief because the courts "address not what is prudent or appropriate, but only what is constitutionally compelled." S*ee also* Rompilla v. Beard, 545 U.s. 374, 383 (2005) ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." As explained in State v. Row, 131 Idaho 303, 313 (1998), "Counsel was not required to investigate Row's entire life in order to objectively and reasonably

present Row's mitigation evidence. Trial counsel's decisions concerning Rows mental health and her allocution statement were strictly strategic and shall not be second-guessed by this Court." *See also* Babbitt v. Calderon, 151 F.3d 1170, 1173-74 (9th Cir. 1998) (quote and citation omitted) ("While a lawyer is under a duty to make reasonable investigations, a lawyer may make a reasonable decision that particular investigations are unnecessary. To determine the reasonableness of a decision not to investigate, the court must apply a heavy measure of deference to counsel's judgments."); Sims v. Singletary, 155 F.3d 1297, 1318 (11th Cir. 1998) ("A defense attorney has limited resources and must make the best decisions possible regarding allocating resources based upon his or her knowledge and experience"); Mahaffey v. Page, 151 F.3d 671, 685 (7th Cir. 1998) (citations omitted), vacated in part, 162 F.3d 481 (7th Cir. 1999) ("A reasonable investigation does not mandate a scorch-the-earth strategy, a requirement that would fail to consider the limited time and resources that defense lawyers have in preparing for a sentencing hearing"). As explained in Dyer v. Calderon, 122 F.3d 720, 735 (9th Cir. 1997), *vacated on other grounds,* 151 F.3d 970 (9th Cir. 1998) (en banc), "We have never held that counsel has a duty to uncover every aspect of a defendant's past and to present all evidence that might bolster a defendant's mitigation case. Rather, trial counsel's resources are limited and the strategic decision to emphasize certain aspects of a defendant's background at the expense of investigating others is both reasonable and wholly acceptable."

Contrary to Abdullah's contention that is based only upon ABA Guidelines, there is no mandate that the mitigation investigation begin "at the earliest opportunity." (Brief, pp.110-11.) The duty to investigate must be considered in light of the "limited time and resources that defense lawyers have in preparing for a sentencing hearing." Mahaffey, 151 F.3d at 685. In Moody v. Polk, 408 F.3d 141, 148 (4th Cir. 2005), the petitioner contended counsels'

performance was ineffective because of their failure to "immediately contact Moody's half brother ... upon receiving his contact information." The court recognized the timing of the contact was irrelevant because the brother was eventually contacted and the "state court could reasonably have concluded that the failure to contact him *immediately* was a reasonable decision." Id. at 149 (emphasis in original). Any complaint Abdullah has about the timing of counsels' mitigation investigation likewise fails because of the necessity of making reasonable tactical decisions about the priorities associated with Abdullah's case, particularly in light of his instructions to counsel regarding investigation of mitigation and preparation for sentencing:

> Now to the death penalty. The State said they will seek the death penalty when they find me guilty. You are so worried about that; you're not focusing on the guilty part. I know you have to do certain things in death penalty cases. I admire you for being so worried about it, but I have told you over and over again, "Don't worry about the death penalty, and please work on the case to make it ready in time for the trial." . . . .
>
> ****
>
> Again, I ask you with all due respect to please work on the guilty part of the case. If you have extra time, then go ahead and work on the death penalty part. Know that neither you nor the state can change the time of my death one second earlier or later. Please, Gus, I am not worried about that at all. . . .

(R., pp.3741-43.)

In developing their mitigation strategy, Abdullah's attorneys were entitled to rely upon their client's representations. Paradis v. Arave, 954 F.2d at 1491. As explained in Wilson v. Henry, 185 F.3d 986, 989 (9th Cir. 1999) (quoting Strickland, 466 U.S. at 691), "reasonableness is 'substantially influenced' by the defendant's statements and actions. '[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.'" "The client's wishes are not to be ignored entirely. 'The reasonableness of

counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.'" Campbell v. Kinchloe, 829 F.2d 1453, 1463 (9th Cir. 1987) (quoting Strickland, 466 U.S. at 691).

Further, Abdullah's contention regarding the retention of a mitigation specialist and the roll that individual should play in defending a capital case is without merit, having been rejected by this Court. Hairston, 133 Idaho at 516; Row, 131 Idaho at 311.

3. Mitigation Expert And Investigation

Abdullah's complaints regarding the "mitigation specialist" and the nature of her investigation are vague and perplexing, but appear to focus upon the speed with which the mitigation investigation was completed and Toryanskis allegedly limiting the investigation. (Brief, pp.112-13.) However, the evidence does not support Abdullah's contentions and the allegations are irrelevant since, as explained above, the test for IAC is not the speed of the investigation or the sheer volume of mitigation, but whether counsels' performance was deficient and whether any alleged deficiency was prejudicial, neither of which Abdullah has established.

Rosanne Dapsauski, a "mitigation expert," became involved with Abdullah's case while he was represented by Cahill and Myshin and had "free reign to do whatever she thought." (UPCPA, R., p.3785 (p.9), p.3783 (p.89), p.3785 (p.99).) During that time, Dapsauski "worked on a draft chronology of [] Abdullah's life, requested some records, . . . and met with members of the Boise Muslim community." (Id., p.4040.) She also traveled to Nashville and conducted interviews with family members and Abdullah's community associates, which were videotaped, and collected a "number of videotapes made by members of [] Abdullah's family depicting various aspects of [his] life, and a video made by Nirgas Abdullah entitled 'Kurds In America.'"

(Id.) The individuals interviewed included, "Haji Abdullah Fetah, Rahan Mustafa, Dilshad Abdullah, Musheer Abdullah, Shazad Abdullah, Bahzad Abdullah, Araz Abdullah, Ayaz Abdullah, Nirjivan Abdullah, Daut Abdullah, Faud Kuremay, Nirgaz Abdullah, Mahmood Alakeeni, Tahir Hussein, Piros Hasan, Kohar Abdi, and Mehdi Mohammad." (Id.)

Toryanskis continued to utilize Dapsauski after they were retained by Abdullah (id., p.4041) who completed a notebook marked "DRAFT" that "contained a social history of [] Abdullah, chronology of significant mitigation related [to] events in his life, notes from [her] interviews with family members and other mitigation witnesses, and various records [she] collected in the course of [her] work on [] Abdullah's case" (id., p.4044).[32] Dapsauski asserted she also worked on mitigation issues "a few days . . . prior to sentencing," but fails to explain what that work involved. (Id., p.4045.) While Dapsauski contends there were undeveloped aspects of mitigation (id., pp.4046-47), most of those areas, as detailed below, involve issues that were developed and presented at the sentencing hearing. Dapsauski also opined the "mitigation presented in [] Abdullah's case was not meaningful" and "[t]he jury never received a complete picture of who [he] really is" (id., p.4047), but never explains the basis for her opinion and concedes she "was present for only short portions of [his] sentencing" (id., p.4045). Dapsauski was not called as a witness at the evidentiary hearing. Moreover, as detailed below, her opinion ignores the powerful mitigation that was presented at the hearing.

While the exact basis of Abdullah's argument is uncertain, it is clear the mitigation investigation was not "'hurriedly thrown together by defense counsel' after their confidence in an acquittal had evaporated." (Brief, p.112.) The mitigation investigation was timely,

[32] Toryanskis filed a motion to have Dapsauski appointed on July 11, 2003 (R., p.1576A (Motion to Approve Def's *Ex Parte* App. for Costs)), which was approved July 28, 2003, with the court allowing the expenditure of $14,500 (id. (Order, p.7)). On October 26, 2004, the court approved an additional $8,000. (R., p.1576C, Order to Public Defender.)

comprehensive, and, as detailed below, covered the alleged deficiencies now raised by Abdullah involving cumulative testimony from more family members and another "cultural expert" to explain the Kurdish experience.

4. Family Members

Abdullah contends Toryanskis failed to present "meaningful and compelling mitigation evidence through the testimony of [his] family" that involved "humanizing stories" that would have resulted in the jury concluding the mitigation was sufficiently compelling to make the death penalty unjust. (Brief, pp.113-20.) However, Abdullah ignores the evidence that was actually presented, tactical decisions made by Toryanskis, and fails to recognize the additional "humanizing stories" are merely cumulative. Additionally, he has failed to establish a reasonable probability of a different result even with the additional "humanizing stories."

As recognized in Zepeda v. State, 152 Idaho 710, 716 (Ct. App. 2012), presentation of cumulative evidence during post-conviction proceedings to support a claim of IAC does not warrant relief. the Supreme Court has recognized "new" evidence presented during collateral proceedings that merely "duplicate[s] the mitigation evidence at trial" will not meet Strickland's prejudice prong. Pinholster, 131 S.Ct. at 1409-10; *see also* Wong v. Belmontes, 558 U.S. 15, 22 (2009) ("Some of the evidence was merely cumulative of the humanizing evidence Schick actually presented; adding it to what was already there would have made little difference."). The Ninth Circuit has also concluded cumulative evidence presented on collateral review does not meet Strickland's prejudice prong. Cunningham v. Wong, 704 F.3d 1143, 1161 (9th Cir. 2013); *see also* Schurz v. Ryan, 730 F.3d 812, 815 (9th Cir. 2013) (quotes and citation omitted) ("The evidence Schurz cites would have been cumulative, and so, not . . . likely to have affected the outcome of the sentencing."); Rhoades v. Henry, 638 F.3d 1027, 1051 (9th Cir. 2011) (quotes and

citation omitted) ("much of the newly adduced evidence is cumulative, and adding it to what was already there would have made little difference"); Cox v. Ayers, 613 F.3d 883, 900 (9th Cir. 2010) (quotes and citation omitted) ("[T]hat evidence is cumulative of what was presented at the penalty phase, and adding to what was already there would have made little difference.").

The mitigation theme was explained in Kim's opening statement, which revealed the jury would hear of Abdullah's background, loving family, having raised a number of siblings, his father's illness, having "stepped up to the plate to help his family and shoulder[] great responsibility for the upbringing of his brothers and sisters," performing "many good deeds and that his life has touched many people and his life has value," lack of a criminal record, the Kurdish experience and helping his family cope with living in an encampment in Turkey, helping his family "assimilate into American life," and "good work in his record," demonstrating "the death penalty's inappropriate for a man whose life has contributed something to so many." (Tr., Vol.VIII, pp.213-14.)

Kim's opening was supported with extensive evidence, including testimony from Abdullah's father, Haji Fetah ("Haji"), who detailed the family's life in Kurdistan, including the "genocide from Anfal" and the Iraqi regime "dropp[ing] bombs on our village to try to destroy our village so you have to leave." (Id., pp.283-84.) Haji was a "Kurdish fighter . . . trying to depend [sic] themselves from the Iraqi regime" that resulted in his imprisonment for two years while his family lived in the Koremy Village. (Id., p.284.) Haji explained how Abdullah "was acting as . . . head of [the] household and he took care of the whole family, he took them out and smuggled them out of the country." (Id., p.285.) Life was difficult for the family because of the war. (Id.) Abdullah also took care of M.A. who was the oldest son and was "mentally challenged." (Id., pp.285-87.) Haji detailed the exodus from the village to Turkey where the

family was living because of the war and "Anfal campaign" resulting in the death of Haji's two uncles and two sons and involved walking through the mountains and living in caves while the area was bombed. (Id., pp.287-88.) Upon arrival in Turkey, the family was not provided food, water, or shelter for nearly twenty days. (Id., p.288.) After approximately four years, the family moved to the United States, and Haji explained how Abdullah's actions facilitated that move and helped them assimilate into American culture. (Id., pp.288-90.) Abdullah "did everything good for us and for the family. He was always helping us, helping kids with their assignments, helping us with everything," "learned English faster than the other kids and he was very smart in school," continuing to "act[] as head of the household," "giving [Haji] some advice, teaching [Haji] things," "paying our bill and helping us," graduating from school and finding employment at various locations, and "working as an interpreter." (Id., pp.290-91.)

Abdullah's younger brother, Dilshad Abdullah ("Dilshad"), also testified about living in Kurdistan, confirming Haji had been in jail and that Abdullah had to work to feed their family. (Id., pp.295-96.) Abdullah took charge of the family and would do the "same thing my dad would do." (Id., p.297.) Dilshad discussed the helicopters that bombed their village or were used "just to check on us" and "then they would come like a week later and then burn our house and look for, like, all the guys that they take them and put them in jail and stuff like that." (Id., p.296.) They lived in mud houses built by Haji on four different occasions because "they would bomb it." (Id.) They fed themselves by growing crops (id.) and using sling shots to kill birds (id., p.298). Dilshad discussed the Iraqi army taking his father's cousin from the fields and his return after having been tortured by using "electricity on his private parts." (Id., pp.297-98.) Dilshad was to learn from Abdullah who took them "everywhere. Just we would look up to him." (Id., p.298.) He also discussed the exodus from their village because the army was going

to kill "whoever is over 13 years old," the trek through the mountains and living in caves, which involved the use of a donkey to transport their belongings, and living without fires because they would be seen by soldiers. (Id., pp.299, 302-03.) The murder of Dilshad's uncle was discussed, which was witnessed by Abdullah and occurred when his father was taken into custody. (Id., pp.300-01.) Dilshad confirmed coming to the United States and Abdullah's role as the family leader, including translating for family members, taking them to appointments, helping with school work, and teaching them to drive and ride bicycles. (Id., pp.303-04.) Through Dilshad, multiple family photos were introduced and explained to the jury, which included photos from their homeland and the United States. (Id., pp.309-15; R., p.1586, Exhibits K-II.)

Abdullah's cousin, Nichivan Abdullah ("Nichivan"), described fleeing to the Turkish camp, living in tents, being without "suitable clothing," begging for food, and having to "sneak out" and return at night because soldiers surrounded the camps. (Id., pp.317-18.) He explained how Abdullah "was like a father" and discussed a time when he fell into a hole and was rescued by Abdullah. (Id., p.318.) While they had water, it was not suitable for drinking, but was from the sewers at military bases. (Id., p.319.) Weather conditions were harsh with two to three feet of snow. (Id.) Nichivan described another incident at a movie theatre with a TV and VCR that involved a fight between the Turkish military and resulted in the shooting of Kurdish people. (Id., p.320.) Abdullah took Nichivan and his younger brother home, telling them, "Don't go up there for the rest of the day." (Id.) Abdullah was "like [Nichivan's] older brother" who was "not capable of doing some of the things that [Abdullah] was able to do for [them]." (Id., pp.320-21.) Nichivan also discussed coming to the United States and Abdullah waiting for him at the airport and alleviating Nichivan's concerns about being killed. (Id., p.321.) Abdullah assisted at the Refugee Center as a translator, taught from the "holy book," explained how to dress, and

"basically taught us how to act as grownups when we were still little kids." (Id., p.322.) Finally, Nichivan expressed his love for Abdullah. (Id., pp.322-23.)

Rahan Mustafa ("Rahan"), Abdullah's mother, testified. (Id., pp.350-58, 74-78.)[33] However, her testimony was hampered because she is illiterate and could not understand many of the words being utilized by the attorneys, which resulted in Mitch recognizing the necessity of keeping questions "extremely simple" and "short." (Id., pp.352-53.) Nevertheless, Rahan provided testimony regarding her relationship with Abdullah after coming to the United States, explaining how he came to her house "[e]very week twice," going to his house and "sleeping over night," and having lunch "almost every day that he was at work." (Id., p.356.) Rahan also explained Abdullah is "very best -- the most -- the best person, best person in my family and he is a very honest man asks for mercy. So this is why I like him the most." (Id., pp.377-78.) The state recognizes Abdullah filed an affidavit from Rahan providing additional information she would like to have provided during her testimony. (UPCPA, R., pp.4747-69.) While the affidavit is eloquently written, presumably by the SAPD, it is unknown how all of the information would have been conveyed to the jury considering Rahan's difficulties understanding the questions asked at the sentencing hearing and the use of a translator. Indeed, it may be the very reason Mitch limited his questioning of Rahan, a tactical decision that was certainly warranted under the circumstances.

The testimony of these four family members clearly humanized Abdullah before the jury and provided such a compelling story of his tragic childhood and upbringing that the state raised "concerns about counsel's composure." (Id., p.341.) The district court "share[d] this concern," noted "this is an emotional experience," and admonished Kim "keep your emotions under

[33] Rahan's first name was apparently misspelled in the transcript as "Rihan."

control. . . . So I know that is difficult, but I'm going to admonish you that at this time if you can't control yourself, then, what you are going to have to do is have your co-counsel do the cross-examination." (Id.) The court further explained, "this has been an ongoing issue where [Kim] has become tearful and choked up when she's cross-examining or when she's examining witnesses and -- or when she is going back to the defense counsel table." (Id.) This clearly was not a situation where counsel was "disinterest[ed]" in the witnesses' responses and merely "getting the testimony over with," but provided evidence that was moving and resulted in counsel "expressing some interest or sympathy." (Brief, p.116.)

Abdullah also contends the witnesses should have been better prepared to testify. However, it is likely if Toryanskis did not provide further preparation it was because of their desire to have spontaneity, which can arguably result in greater emotion before the jury since the witnesses were not aware of the exact subject matter of their testimony.

Undoubtedly, Toryanskis also made strategic decisions regarding which family members should testify. *See* Giles v. State, 125 Idaho 921, 924 (1994) ("counsel's choice of witnesses, . . . fall[s] within the area of tactical, or strategic, decisions"). It was more compelling to have Abdullah's parents, a sibling, and an extended family member testify, than have others testify in their place. Additionally, there was an issue involving Abdullah's sister, Farha Abdullah, attempting to speak to the jury during the trial after she testified that resulted in the court admonishing Toryanskis to "caution them that they are only to answer the questions. This is not an opportunity for them to make speeches, and it's not an opportunity for them to have -- make any attempt to communicate with the jury." (Tr., Vol.VII, pp.731-32.) There can be little doubt Toryanskis made tactical decisions to limit the number of "humanizing" witnesses because of a desire to use a scalpel as opposed to a meat clever, particularly since the emotional impact

associated with the testimony of Abdullah's parents, his brother, and cousin may have been lost by repetition of the same general testimony from additional witnesses.

Finally, in ascertaining prejudice, this Court is permitted to consider the facts associated with Angie's murder, which is clearly aggravating evidence. Bobby v. Van Hook, 558 U.S. 4, 20 (2009); Pizzuto v. Arave, 280 F.3d 949, 964 (9th Cir. 2002); Allen v. Woodford, 395 F.3d 979, 1009 (9th Cir. 2005). As recognized by the district court:

> To have convicted Abdullah of all the crimes charged, the jury had to have concluded that he killed his wife by putting a bag over head, poured gasoline around her body and around the well insured vending machines and committed the arson of his home. Inside the home, as he well knew, were three sleeping children including his step-daughter, her friend and his three week old baby. That his family of origin loves him pales in comparison to the facts of the case. Additional family testimony was unlikely to change the outcome of the case and choosing not to present it was neither deficient nor prejudicial.

(UPCPA, R., pp.8511-12.)

In Van Hook, 558 U.S. at 20 (emphasis in original), the Supreme Court cautioned against "focus[ing] on the *number* of aggravating factors instead of their *weight*." This Court should be cautious in giving the aggravation "short shrift, leading it to overstate further the effect additional mitigating evidence might have had." Id. It is not the number of affidavits obtained from family members after years of investigation by the SAPD that repeat the same evidence from the sentencing, but the content of the mitigation at the sentencing hearing that should be given the most consideration. *See* Wong, 558 U.S. at 25 ("The type of 'more-evidence-is-better' approach advocated by Belmontes and the court of appeals might seem appealing–after all, what is there to lose? But here there was a lot to lose."). Even if there was non-cumulative evidence uncovered by the SAPD, "the investigation and presentation of mitigating evidence by trial counsel was substantial and the fact that post-conviction lawyers have managed to find some that may be non-cumulative does not lead to a conclusion different from that of the post-conviction

court, that [Abdullah's] trial counsel performed better than the Sixth amendment requires." State v. McManus, 868 N.E.2d 778, 791 (Ind. 2007). Certainly, this Court must "weigh[] the entire body of mitigating evidence (including the additional testimony [Abdullah] could have presented) against the entire body of aggravating evidence (including [anything additional from the state])." Id. at 20. However, considering the quality of the mitigation presented at sentencing and the cumulative nature of the additional evidence against the exceptionally heinous nature of the crimes for which he has been convicted, Abdullah has not established a reasonable probability of a different result even if the additional evidence had been presented.

5. Cultural Expert

Abdullah contends Toryanskis were ineffective because Dr. Michael Gunter "lacked the background and experience necessary to convey to the jury, in a personal manner, the Kurdish experience" and "should have consulted with an expert who could have related with [Abdullah's] Kurdish experience, and conveyed that experience in a professional manner to the jury." (Brief, p.120.) While Abdullah has now retained the services of a new expert, Dr. Asfandiar Shukri, Toryanskis' use of Dr. Gunter was not deficient and Abdullah has failed to establish prejudice.

Pursuant to Abdullah's October 20, 2003 request (R., p.1576A (Def's *Ex Parte* Motion to Approve Third App. for Costs, pp.2-7)), the district court appointed Dr. Gunter for purposes of the penalty phase (id. (Order, pp.6-7)). At sentencing, Dr. Gunter explained he had been a professor in political science at Tennessee Technological University since 1981, teaching predominately on international relations, international law, international organizations, and American foreign policy. (Tr., Vol.VIII, pp.269-70.) He had been a "senior Fulbright lecturer of International relations at the Mid East Technical University in Ankara, Turkey during the 1978, 1979 academic year" and explained he was "a leading academic expert in the world" on the

"Kurdish situation." (Id., p.270.) He detailed the issues associated with the "Kurdish situation," explaining, "the Kurds as a people go back into time in memorial" (id., p.271) using a map of the Middle East to assist in explaining his testimony to the jury (id., pp.271-72; Exhibit J). He further explained the problems between the two different ethnic groups. (Id., p.274.) Dr. Gunter next discussed the significance of the Koremy Village, which involved the "Anfal campaign" and Sadam Hussein turning on "Iraqi Kurds in a genocidal campaign of annihilation, which truly has been termed genocide" after the Iran-Iraq war in the 1980's. (Id., p.l275.) Dr. Gunter explained, "there were many notorious examples of just outright murder of Kurdish people in northern Iraq. And one of the most notorious examples on the Anfal campaign was in the village of Koremy." (Id.) In detail, Dr. Gunter discussed the "Anfal campaign," explaining, "During the Iran-Iraq war some ethnic Kurds supported the Iranian enemy of Iraq. As a result, Sadam turned on the Iraqi Kurds en mass after the war and a campaign of annihilation to destroy the Kurdish villages and many Kurds physically in a campaign that some termed Anfal. Anfal being the title of the eight [sic] chapter in the Koran, the holy book of Islam." (Id., pp.275-76.) He also explained what happened to the Koremy Village:

> Koremy has been attacked at least three times in the last 40 years by the Iraqi Army. In the 1980s at the end of the Iran-Iraq war, during the Anfal campaign the Iraqi army physically destroyed Koremy. The inhabitants of Koremy knew it was coming, fled in the mountains living in caves and so forth.
>
> When the inhabitants came back to retrieve some of their belongings, they were captured by the Iraqi army and it was a notorious example of the Anfal campaign. Some 30 of these Kurdish adult men, adult being defined as approximately 15 years or older, were taken out and summarily shot, killed.

(Id., p.276.)

When asked if the Koremy homes were subsequently habitable, Dr. Gunter responded, "No. The idea of Sadam's Anfal campaign was to destroy the Kurdish villages, to destroy the

possibility that Kurds could actually live any more in those villages. I think the long-term intention was for Sadam to herd what Kurds remained into large scale detention camps." (Id., pp.276-77.) Dr. Gunter discussed problems with the water supply, explaining wells were "cemented up, poisoned. And the idea was to make it very difficult or impossible for the Kurdish inhabitants to ever return." (Id., p.277.) He also explained the exodus from Koremy into Turkey, describing how the Kurdish people survived in caves for "several months." (Id., pp.277-78.) Survival in Turkey was also discussed: "the Kurds have always had difficult relations with Turkey because Turkey fears that Kurdish devines would lead to the territorial breakup of Turkey." (Id., p.278.) Discussing Turkish living conditions, Dr. Gunter explained, "Turkey itself is really in much respect[s] a third world country, especially in this area and Turkey did not have a particular love for the Kurds either. On the other hand, Turkey did attempt to give minimal support to the Kurdish refugees, but it was very minimal and very marginal and the Kurds were interned in camps in Turkey." (Id., pp.278-79.) Education, medical care, and food were "very minimal" and "submarginal." (Id., p.279.)

The state recognizes Abdullah's new expert, Dr. Shukri, is qualified to testify regarding the horrid conditions in Abdullah's homeland. However, in light of the family members' testimony, any additional evidence regarding Dr. Shukri's experiences "from a personal standpoint" (Brief, p.122) would have been cumulative evidence. Moreover, while Dr. Shukri may have the expertise to testify regarding those conditions, there is no evidence he has expertise to testify regarding the "effects" those conditions had on Abdullah or any member of his family.

Abdullah's attempt to raise ineffectiveness based upon Toryanskis' alleged failure to shop for a different expert is unavailing. "Counsel is not required to shop for an expert who will testify in a particular way." Winfield v. Roper, 460 F.3d 1026, 1041 (8th Cir. 2006); *see also*

Lundgren v. Mitchell, 440 F.3d 754, 773 n.6 (6th Cir. 2006) ("even in capital cases, a defendant is entitled to only one qualified mental health expert at the expense of the state, even if the conclusions of that expert fail to favor the defense"); Dowthitt v. Johnson, 230 F.3d 733, 748 (5th Cir. 2000) ("counsel was not deficient by not canvassing the field to find a more favorable defense expert"); Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) ("The mere fact that [petitioner's] counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance."). As explained in Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998), "The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a partial psychiatric examination was appropriate." The court further explained, "'The ultimate result would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis.'" Id. at 402 (quoting Harris v. Vasquez, 949 F.2d 1497, 1517 (9th Cir. 1990)).

The mitigation presented by Toryanskis was exceptionally compelling. There are always more witnesses and evidence that can be presented and trial counsels' decisions can always be second-guessed. However, finding additional cumulative evidence and witnesses has never been the test for determining whether counsels' performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688.

Further, Abdullah has failed to establish a reasonable probability of a different result. Not only did Toryanskis present compelling family and expert testimony, but testimony was presented from Pam Lewis and Jim Rogers who eloquently testified regarding their interaction

with Abdullah and his family after arriving in Boise (Tr., Vol.VIII, pp.326-40) and has been completely ignored by Abdullah. The state recognizes Dr. Gunter was not cross-examined, but rather than supporting a perceived weakness in his testimony, the prosecutors' strategic decision demonstrates their resolve that virtually no amount of mitigation was going to overcome the aggravation stemming from the brutal acts Abdullah perpetrated against his wife and young children and that the Dr. Gunter's testimony was not refutable.

G. Expert Testimony Regarding Eyewitness Identification

Abdullah contends Toryanskis were ineffective in allegedly failing to retain an expert on eyewitness identification and presenting such testimony at the suppression hearing challenging Wood's identification and the subsequent trial. (Brief, pp.126-33.) While it is true Abdullah did not have an expert testify at the hearing or trial, he is mistaken that someone was not retained and, more importantly, Abdullah has failed to establish either deficient performance or prejudice.

Abdullah requested an expert in July 2003 (R., p.1576A, Mtn. to Approve Def's *Ex Parte* App. for Costs, pp.7-8) but his motion was denied because an expert was not identified (id., Order Regarding Def's Sealed *Ex Parte* App. for Cost, pp.5-6). Abdullah next requested the appointment of Dr. Elizabeth Loftus (id., Def's *Ex Parte* Mtn. for Supp. App. for Costs, pp.5-7), which was denied because of Abdullah's failure to explain "why an expert psychologist or psychiatrist in the local area cannot testify that single photo identifications . . . are suspect" or why "these issues cannot be addressed in pretrial motions" (id., Order Regarding Def's Sealed *Ex Parte* Supp. App. for Costs, p.6). Abdullah renewed his requesting, asking that Dr. Charles Hontsbe appointed (id., Def's *Ex Parte* Mtn. to Approve Second App. for Costs, pp.1-4), which the court granted (id., Order Regarding Def's Sealed *Ex Parte* App. for Costs, p.2)).

After Abdullah's motion to suppress Wood's identification was filed (R., pp.179-80), a hearing was held where Wood and the officers involved in the identification testified (Tr., Vol.I, pp.275-345). After analyzing the evidence and relevant law, the district court made findings of fact (id., pp.349-54) and concluded there were no due process implications associated with Wood's identification (id., pp.356-57), but even if due process implications were involved, there was not a "substantial risk of mistaken identification" (id., p.357). The court further examined the relevant factors if the identification was the result of suggestive procedures and concluded Wood's identification "was sufficiently reliable to outweigh any potential low level suggestiveness in identification, if, in fact, such suggestiveness existed." (Id., p.362.) The state subsequently filed a Motion in Limine, asserting expert testimony regarding eyewitness identification was not scientific and challenging Dr. Honts' qualifications. (R., pp.1095-96.) Eventually, a decision was made by Toryanskis not to oppose the state's motion because "[Dr. Honts] is not an expert in eye witness identification and eye witness identification may not be proper science." (UPCPA, Tr., p.76.) After completion of voir dire, Kim stated, "I don't believe we are going to be calling Dr. Honts. We worked through our issue regarding Dr. Honts and I don't believe he is going to be called as a witness." (Tr., Vol.III, p.802.) At the post-conviction evidentiary hearing, Kim agreed this was "the result of a strategic decision made by [her] and [her] husband." (UPCPA, Tr., p.79.) Mitch confirmed that whether Dr. Honts was an expert in the areas of eyewitness identification and the entire area of an expert testifying regarding eyewitness identification was "an issue," but contended it was "important to have someone explain these issues to the jury." (Id., pp.948-50.)[34]

[34] The state's and Toryanskis' determination regarding Dr. Honts' qualifications was prophetic because this Court later agreed. State v. Pearce, 146 Idaho 241, 246-47 (2008).

To the extent Abdullah is contending Toryanskis were ineffective in failing to retain an expert, his claim is mistaken because they did retain Dr. Honts. While it was later learned Dr. Honts may not be qualified to render such expert testimony, Toryanskis cannot be faulted because the district court denied their motion to retain Dr. Loftus and Pearce, 146 Idaho at 246-47, was not decided until well after Abdullah's trial.

The due process clause requires suppression of an in-court identification only if it is tainted by an impermissibly suggestive out-of-court identification that is "so suggestive that there is a very substantial likelihood of misidentification." State v. Hoisington, 104 Idaho 153, 162 (1983) (quoting State v. Crawford, 99 Idaho 87, 103 (1978)). In Hoisington, the supreme court reaffirmed the adoption of Manson v. Brathwaite, 432 U.S. 98 (1977), and Neil v. Biggers, 409 U.S. 188 (1972), dealing with the issue of impermissibly suggestive out-of-court identifications, and further explained the test for suppression of an in-court identification that is allegedly tainted by an impermissibly suggestive out-of-court identification:

> [T]here will not be a "very substantial likelihood of misidentification" as long as "the identification possesses sufficient aspects of reliability." [*Crawford*, 99 Idaho at 103.] As stated in *Manson*, "[R]eliability is the linchpin in determining the admissibility of identification testimony." 432 U.S. at 114, 97 S.Ct. at 2243. That rule applies to both in-court identification as well as evidence concerning out-of-court identifications. 432 U.S. at 106 n. 9, 97 S.Ct. at 2249 n. 9. Thus, as stated in *Neil v. Biggers*, 409 U.S. at 199, 93 S.Ct. at 382, the central question is "whether under 'the totality of the circumstances' the identification was reliable even though the [identification] procedure was suggestive."

Hoisington, 104 Idaho at 161-62.

The court further delineated, based upon Manson and Biggers, the factors to be considered under the totality of circumstances test:

> (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the identification, and (5) the length of time between the crime and the identification.

Hoisington, 104 Idaho at 162.

Each of these factors were reaffirmed in Payne, 146 Idaho at 137-38, and State v. Almaraz, 154 Idaho 584, 593, 597 (2013), and carefully examined by the district court in denying Abdullah's motion to suppress Wood's identification. (Tr., Vol.I, pp.349-62.) Based upon these factors, Abdullah has failed to explain how an expert testifying at the suppression hearing would have resulted in Wood's identification being suppressed since none of the factors depend upon an expert's analysis or opinion.

Additionally, prior to Abdullah's trial, the Idaho Court of Appeals recognized, "The issue of the admissibility of expert witness testimony on the reliability of memory and perception is an area of some controversy and question under our rules of evidence." State v. Pacheco, 134 Idaho 367, 371 (Ct. App. 2000). While the court, in dicta, concluded, "in appropriate circumstances such testimony, properly circumscribed, may be of assistance to the jury regarding eyewitness identification and the factors to be considered in determining the accuracy of such identification," Id. at 371 n.2, Idaho's appellate courts have never explained what "properly circumscribed" entails or when such evidence may be admissible. In light of the facts surrounding the identification in Pacheco, the court concluded, "the district court did not abuse its discretion in ruling that the reliability of the ZCMI officers' observation of a firearm in Pacheco's hand was well within the ability of the jury to determine, i.e., that no expert testimony was needed to aid the trier of fact in understanding the evidence or determining a fact in issue." Id. at 371. Likewise, based upon the facts found by the district court (Tr., Vol.I, pp.349-62), Abdullah has failed to establish counsels' failure to present expert testimony was objectively unreasonable or that the outcome of his trial would have been different.

More importantly, in Payne, 146 Idaho at 563 (quotes and citations omitted), this Court addressed an allegation that counsel were ineffective by failing to call an expert to testify regarding eyewitness identification and recognized, "The decision of what witnesses to call is an area where we will not second guess counsel without evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." Abdullah has also failed to provide evidence establishing the Toryanskis' decisions resulted from inadequate preparation, ignorance or other shortcomings. Rather, their decision was based upon recognition that Dr. Honts was not qualified and the controversy surrounding such expert testimony, coupled with a desire to focus upon other key areas. Considering the fact other evidence established Abdullah's presence in Boise, coupled with his lies about his whereabouts at the time of Angie's murder, the Toryanskis' tactical decision was not unreasonable.

While Abdullah attempts to distinguish Payne based upon a jury instruction that was given regarding facts that may bear upon the accuracy of witnesses' identification (Brief, pp.132-33), the instruction involved this Court's prejudice analysis, not deficient performance. Id. at 563 n.3. Moreover, while the instruction was discussed, it was not determinative because this Court recognized the overwhelming nature of the evidence in concluding there was no prejudice. Id. at 564 n.4. The same is true in Abdullah's case because of all the other evidence, including the lies he told the police, the eyewitness identification in Salt Lake establishing he purchased the Halloween cape and gas cans, and the exhaustive physical and forensic evidence establishing he was at the house in Boise and murdered Angie. As recognized by the district court, "the evidence against Abdullah is overwhelming." (UPCPA, R., p.8483.)

H. Expert Testimony Regarding Angie's Manner Of Death

Abdullah contends Toryanskis were ineffective in failing to present expert testimony establishing Angie's manner of death was "undetermined" as opposed to being a homicide. (Brief, pp.133-35.) Abdullah's claim is somewhat perplexing because it appears to be based on Dr. Groben's grand jury testimony wherein he explained that he considered whether Angie committed suicide, but rejected that theory, in part, because there was no "alcohol and drugs on board to allow them to put a bag over their head and kill themselves." (R., p.1576, G.J. Tr., pp.147-48.) Of course, this testimony was repeated before the jury because this was Dr. Groben's opinion prior to completing the additional testing of Angie's blood and learning of the excessive Fluoxetine in her blood. (Tr., Vol.VI, pp.447-48.) However, contrary to Abdullah's contention, Dr. Groben did "reconsider his opinion once he found a potentially lethal amount of Prozac in Angie's system." (Brief, p.135.) Dr. Groben amended his autopsy report to reflect the cause of Angie's death was "Fluoxetine poisoning associated with asphyxiation due to a bag over her head." (Tr., Vol.VI, p.480.) While Dr. Groben considered the results of the additional testing in ascertaining the manner of death, because of all the other circumstances surrounding Angie's death "that precluded anything other than homicide," he declined to change his opinion regarding the manner of her death. (Id., pp.480, 489.)

Nevertheless, pursuant to Abdullah's motion that was filed prior to the additional toxicology testing being completed (R., p.1576A, Def's *Ex Parte* Motion to Supp. App. for Costs, pp.2-3), Dr. Paul Herrmann was appointed by the court to assist the defense team (id., Order Regarding Def's Sealed *Ex Parte* Supp. App. for Costs, p.7). While Dr. Herrmann agreed with Dr. Groben's initial opinion regarding the cause of Angie's death, he opined the manner of death was "undetermined" "because there were circumstances that weighed in favor of both

homicide and suicide." (UPCPA, R., p.4054.) Dr. Herrmann explained, "Circumstances that would weigh in favor of homicide include the arson fire and the unusual position of the decedent's body. Circumstances weighing in favor of suicide included the decedent's psychiatric history, the absence of any signs of trauma on the decedent's body, and the high level of Fluoxetine in the decedent's system at the time of her death." (Id.) Dr. Herrmann did not testify at Abdullah's trial. During her deposition, Kim explained Dr. Herrmann's conclusions changed as they prepared for trial and he was "unwilling to give us an opinion that the circumstances in this case supported the defense theory of suicide." (UPCPA, R., p.2425 (pp.519-20).) While noting Dr. Herrmann did not testify, Mitch was never asked why Dr. Herrmann did not testify. (UPCPA, R., pp.2926-28 (pp.485-91).) Obviously, counsel were permitted to make a strategic decision to not have Dr. Herrmann testify, particularly since his opinions were inconsistent with the theory being advanced by the defense.

Attempting to overcome Toryanskis' strategic decision to not have Dr. Herrmann testify, Abdullah contends the "real reason" he was not called "was their fear if he did, he could be impeached with the Toryanskis' plea negotiation statements to the prosecutor about the circumstances surrounding Angie's death." (Brief, p.134.) Contrary to Abdullah's contention, Kim never testified that was the rationale for not having Dr. Herrmann testify, but merely discussed her understanding of how the state might utilize the information that was given by Toryanskis during plea negotiations. (UPCPA, R., pp.2421-23 (pp.502-10).) Irrespective of Kim's deposition testimony years after the fact, the letter to the state upon which Abdullah relies clearly states, "For Settlement Purposes Only – Inadmissible Under Idaho Rule of Evidence 410." (UPCPA, R., p.2583.) The prosecutor recognized information received via plea negotiations could not be admitted, explaining in an e-mail, "Certainly, I cannot use these in my

case," but expressed concern regarding whether the information had been conveyed to Abdullah's experts. (Id., p.2628.) Irrespective of the law under I.R.E. 410, it is illogical to assume the state would not have cross-examined Dr. Herrmann and asked him exactly what information he had reviewed and would have been able to present to the jury any information provided to Dr. Herrmann. If the information was not provided, the state clearly recognized the information could not be utilized. Abdullah's speculation regarding why Toryanskis tactically chose not to have Dr. Herrmann testify is not supported by the record.

Abdullah has also failed to establish any prejudice. Because of the problems associated with Dr. Groben's autopsy of Angie's body and the toxicology testing having to be repeated, there was no reason to have Dr. Herrmann testify. As explained in Richter, 131 S.Ct. at 791, "In many instances cross-examination will be sufficient to expose defects in an expert's presentation." This is particularly true in Abdullah's case because of the problems associated with determining both the cause and manner of death as a result of the bungled testing. Moreover, Dr. Herrmann was only willing to testify the manner of death was "undetermined," which is vastly different from definitively opining it was "suicide." Additionally, the factors Dr. Herrmann believed weighed in favor of suicide were all discussed extensively at the trial either by Dr. Groben or other witnesses, including Angie's psychiatric history, the absence of any signs of trauma to Angie's body and the high level of Fluoxetine in her body. Since these three factors alone allegedly support Dr. Herrmann's opinion and they were exhaustively discussed by Dr. Groben and/or other witnesses, Dr. Herrmann's testimony would have been cumulative and certainly would not have changed the jury's guilty finding.

Finally, the SAPD has now retained the services of another expert, Dr. Clifford Nelson, who agrees with Dr. Herrmann's conclusion that the manner of death is allegedly undetermined.

(UPCPA, R., pp.4339-48.) However, as detailed in section XXIV(F)(5) above, trial counsel is not required to shop for an expert post-conviction counsel subsequently believes will offer a more favorable opinion. There is no indication Toryanskis' retention of Dr. Herrmann was deficient or prejudicial and, therefore, the opinions of Dr. Nelson should be disregarded.[35]

I. Expert Testimony Regarding The Gas Additive

Abdullah contends Toryanskis were ineffective for not having their arson expert, Dr. John Thornton, or some other expert evaluate the gas samples and opine whether the additive Hi-TEC 6423 could be found in gas throughout Boise. (Brief, pp.135-37.) The details associated with Dr. Colucci's testimony are discussed in section III(C) above. Pursuant to Abdullah's motion (R., p.1576A, Def's *Ex Parte* Motion to Supp. App. for Costs, p.4), Dr. Thornton was appointed by the court to assist the defense team (id., Order Regarding Def's Sealed *Ex Parte* Supp. App. for Costs, p.7). Dr. Thornton explained to counsel, "an arson accelerant, likely gasoline, was applied inside the house and garage," but was unable to answer Kim's question, "whether the gasoline in evidence showed a marker of having been purchased in Utah," because he needed additional information, including, "Chevron laboratory's discovery material concerning the identification of geographic markers introduced into the gasoline," "[t]he data base of proprietary information that would allow Chevron to opine as to the provenance of the gasoline," and "[b]ench notes pertaining to the Idaho State Crime lab's analysis of the gasoline." (UPCPA, R., pp.4328-29.) As detailed above, because of the proprietary nature of this information, it could not be provided to Dr. Thornton.

[35] Abdullah's claim regarding the district court allegedly using the "wrong standard" by stating, "there was no evidence" that either Dr. Nelson or Dr. Herrmann's "testimony 'would have changed the outcome'" (Brief, p.135) (emphasis omitted) (citing UPCPA, R., p.8486), has been addressed above in section XXIV(D).

Because Dr. Thornton agreed with the state's arson experts, Kim conceded there was "some exposure for the defense in calling an expert who agreed with the major component of the State's case." (UPCPA, Tr., p.569.) Kim further recognized the information requested by Dr. Thornton was unavailable because of its proprietary nature. (Id., pp.569-70.) Finally, Kim conceded Dr. Thornton was not called to testify because he agreed with the state's arson experts and "[y]ou don't want to waste anybody's time. You don't want to waste the judge's time. You don't want to waste the jury's time." (Id., p.602.) Obviously, because of the "exposure," Toryanskis' decision to not have Dr. Thornton testify was perfectly reasonable, particularly in light of the fact that he could not testify regarding Hi-TEC 6423 because the proprietary information was unavailable.[36]

More importantly, on cross-examination Dr. Colucci explained the probability of finding one of his additives in other locations, "[d]epending on the region of the country you go to, even down to a city," was "anywhere from maybe a 10 percent chance all the way up to an 80 percent chance." (Tr., Vol.VI, p.688.) Dr. Colucci further conceded several companies use Hi-TEC 6423, but he was unable to explain how many or which companies. (Id., pp.689-90.) Clearly, the jury was apprised of the fact that Hi-TEC 6423 was available in other areas besides Salt Lake without the need for a defense expert. *See* Richter, 131 S.Ct. at 791 ("In many instances cross-examination will be sufficient to expose defects in an expert's presentation.").

Finally, Abdullah has failed to establish prejudice because the jury was able to infer Hi-TEC 6423 was available in Boise. It was not the presence of Hi-TEC 6423 that was significant,

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[36] Contrary to Abdullah's contention, it was not "undisputed the fire was **attempted** arson." (Brief, p.135) (emphasis added). As detailed above, the state presented extensive and substantial evidence establishing it was an "actual," not "attempted" arson. Moreover, irrespective of what is now contended by Abdullah, the cross-examination of the state's experts at trial demonstrates it was anything but an "undisputed" arson.

but the receipt establishing Abdullah purchased gas at the 7-11 in Salt Lake, which involved more gas than could have been put in his gas tank, along with the fact that there was a "fuel component" that prevented Dr. Colucci from determining the "lowest additive concentration," which is the "lowest treat rate that -- treat rate is the concentration in the gasoline -- that is allowable by law" (Tr., Vol.VI, 682-86), which told him there was something "unique about the fuel that was produced" (id., p.696). Because of the receipt and uniqueness of the fuel that was produced, coupled with all the other evidence, Abdullah has failed to establish a reasonable probability of a different result even if the propriety information could have been provided to Dr. Thornton and he testified Hi-TEC 6423 was in Boise gas at the time of Angie's murder.

J. Failing To Object To Mitch's Letter For Additional Testing

Abdullah contends Toryanskis were ineffective for not objecting to the letter written by Mitch to the prosecutors requesting testing of Angie's blood for additional drugs, including Prozac, contending the jury could infer the request was made because the defense knew substances should have been in Angie's blood at the time of her murder. (Brief, pp.137-39.) Abdullah's claim is preposterous and unsupported by the evidence; he has failed to establish either deficient performance or prejudice.

On December 10, 2003, Mitch sent the prosecutors a letter requesting further testing for additional drugs, including Prozac. (R., p.1585, Exhibit 110.) As a result, Dr. Groben requested additional testing of Angie's blood, which resulted in the discovery of Prozac in her blood. (Tr., Vol.VI, pp.467-73.) To lay foundation to explain why additional testing was completed, the state introduced Mitch's letter, which was admitted without objection. (Id., pp.467-68.) Relying upon a snippet from the prosecutor's closing argument, Abdullah contends the letter established everyone but the defense team was surprised about the subsequent tests. (Brief, p.138.)

However, there was no objection to admission of the letter because there was no basis for objecting. The letter was clearly relevant to explain why additional testing was completed on Angie's blood after Dr. Groben had completed the autopsy and his report. Abdullah's allegations regarding possible jury "inferences" is nothing but speculation, particularly since the letter explains the basis for the defense team's request as follows:

> A subsequent review of records pertaining to Angela's medical history reveal that she had a long history of severe depression and had given birth just three weeks before her death. She had, during various periods prescriptions for depression, her pain and was known to take sedative-hypnotics and tranquilizers. As we have previously stated, some of these drugs are highly addictive and when taken in excess by themselves or in combination with other drugs, can result in depressed breathing and asphyxiation.

(R., p.1485, Exhibit 110.)

The letter clearly reveals the rationale for requesting additional testing was not privileged information disclosed by Abdullah to his attorneys, but a "review of records" that pertained to Angie's "medical history" revealing she had taken prescriptions for depression and pain, which included sedative-hypnotics and tranquilizers. Moreover, Toryanskis' review of Angie's records was confirmed by her medical providers who extensively discussed her taking of various prescribed medications. (Tr., Vol.VI, pp.770-72, 925-30; R., p.1485, Exhibit 123.) Additionally, there was nothing in the letter that would have resulted in its exclusion under I.R.E. 403 because its probative value was not outweighed by the danger of unfair prejudice. Because there was no basis for exclusion of the letter, Abdullah's claim fails. *See* Payne, 146 Idaho at 562 ("Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the [*Strickland*] standard.).

Finally, any claim that the letter actually contributed to Abdullah being convicted is meritless. The letter was admitted merely as foundation to explain Dr. Groben's actions after he completed the autopsy and report. Abdullah has failed to establish that without the letter there is a reasonable probability of a different result.[37]

K. Defense Opening Statement

Abdullah initially contends the district court's findings, "'that throughout his representation, Abdullah continually lied to his attorneys,'" that his "'constantly morphing story precluded his trial counsel from fixating on one defense theory,'" and his "'actions affected the decision to wait to make an opening statement at the close of the State's evidence, present a defense theory, concede his presence in closing argument at the end of the guilt phase, and to not present an alibi defense'" are "premised on both believing and disbelieving [Abdullah] depending on which is necessary to deny him relief. Both cannot be true; if [Abdullah] is not to be believed he is not to be believed with respect to anything he told the Toryanskis and anything he said in his affidavit." (Brief, p.139) (quoting UPCPA, R., pp.8468-69). This argument is nonsensical; clearly the district court was permitted to disbelieve or believe whatever portions of Abdullah's affidavit or any other witnesses' testimony it desired, and Abdullah's argument is contrary to long and well-established law. Dunlap, 141 Idaho at 56 ("The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are matters solely within the province of the district court."); State v. Olin, 103 Idaho 391, 398 (1982) (quoting State v. Cacavas, 55 Idaho 538, 540 (1935)) ("It is within the province

[37] In the final sentence of this claim, Abdullah contends, "Counsel were also ineffective for failing to move to have an independent lab conduct the testing." (Brief, p.139.) Not only does he fail to explain what testing should have been completed, his single sentence contention is supported with absolutely no argument. Because the sentence is not supported by any argument, it has been waived and will not be further addressed by the state. *See* Zichko, 129 Idaho at 263.

of the jury (in a criminal case) to believe or to disbelieve the testimony of any witness, or any portion of such testimony").

Abdullah next contends counsels' decision to delay giving an opening statement and the statement actually given violated his right to effective assistance of counsel. (Brief, pp.140-43.) The decision to postpone an opening statement and the content of an opening statement are the epitome of why strategic decisions cannot be second-guessed, particularly since Abdullah has not even attempted to establish Toryanskis' decision to postpone the opening or the content of the opening was based upon inadequate preparation, ignorance of the law, or other shortcomings capable of objective review.

As explained in Yarborough v. Gentry, 540 U.S. 1, 5-6 (2003), while the right to effective assistance of counsel extends to **closing** arguments, "[n]onetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." While the Supreme Court has yet to address whether opening statements are constitutionally mandated, Herring v. New York, 422 U.S. 853, 863 n.13 (1975), Yarborough's general principles have also been applied in the context of opening statements. *See* United States v. Fredman, 390 F.3d 1153, 1156-57 (9th Cir. 2004); State v. Morgan, 2004 WL 226313, *11 (Ohio Ct. App. 2004); Winfield v. State, 2003 WL 22922272, *6-7 (Tenn. Ct. App. 2003). The Ninth Circuit has also recognized opening statements are a matter of strategy, which are presumed sound and cannot be second-guessed with the benefit of hindsight. Allen v. Woodford, 395 F.3d 979, 999 (9th Cir. 2005). These same principles have also been applied in Idaho. *See* Gabourie v. State, 125 Idaho 254, 259 (Ct. App. 1994).

Likewise, "[t]he timing of an opening statement, and even the decision whether to make one at all, is ordinarily a mere matter of trial tactics and in such cases will not constitute the incompetence basis for a claim of ineffective assistance of counsel." U.S. v. Rodriguez-Ramirez, 777 F.2d 454, 458 (9th Cir. 1985). As explained in Jones v. Smith, 772 F.2d 668, 674 (11th Cir. 1985), the decision to waive opening statement "left the defense uncommitted to a particular position and thus free to develop any defense that might materialize as the State presented its case." In LaGrand v. Stewart, 133 f.3d 1253, 1275 (9th Cir. 1998), counsel chose to delay giving an opening statement until after all of the state's evidence was presented and then lost the opportunity to present a statement because he presented no evidence in defense. The court reasoned, "This was a reasonable tactical decision by counsel and did not constitute ineffective assistance of counsel." Id.

This was the reason Toryanskis chose not to give an opening statement. Kim discussed the decision-making process regarding an opening, explaining, "I recall thinking about -- just weighing the advantages and disadvantages at that decision point. And I recall just sort of thinking that this will allow us to retain some flexibility. We would hear the prosecution's full case, see whatever holes open up in their case, if any." (UPCPA, Tr., p.255.) Mitch confirmed Kim's testimony, explaining the opening was reserved to "let the State put on its case. And then -- and then by the end of their case we would know better what evidence we were going to present and that's what we could --we could tell the jury. We didn't want to promise the jury that they would see all of these things and then not be able to produce." (Id., p.1091.) He also agreed the opening he gave was "a general opening statement," but that was "intentional" because of difficulties associated with locating witnesses that could support the evidence they hoped to present (id., p.1093) and "not want[ing] to overpromise and underdeliver" (id., p.1123).

While it is true the defense already provided notice of an alibi and revealed various aspects of its case to the state prior to trial, it was still unknown how the state's case would unfold. More importantly, as detailed above, Abdullah's stories constantly changed and Toryanskis were uncertain whether he would elect to testify and which story he would tell. Kim explained, "things would sometimes, you know, change radically in how he would respond to us. . . . And there were many, many times that -- in the -- in the course of our -- our representation of him that new and different things popped up." (Id., pp.303-04.) When the "pros and cons" of different defenses were discussed, Abdullah would "tell us this is what happened or this -- and what -- what he would describe could be very different from what he had described at another point in time." (Id., p.305.) Kim reiterated, "he was the one telling us different variations of how he drove up, you know, what the circumstances were, where he was." (Id., p.310.) This is best exemplified by the letter Abdullah wrote to Toryanskis on November 15, 2004, six days after the state rested its case, when he offered an entirely different version of events that involved Angie having him followed to Salt Lake and that person allegedly taking the Halloween cape and gas cans. (UPCPA, R., pp.3613-14.) Kim explained that as a result of the letter, they obtained a recess to talk with Abdullah, particularly since the letter "contained some new -- new things that he never talked about before." (Id., pp.404-05; *see also,* pp.517-19.) Kim's testimony was corroborated by Mitch's testimony. (Id., pp.1219-24.)

Based upon Abdullah's ever morphing story, he cannot establish deficient performance. There can be little doubt, based upon Abdullah's constantly changing stories, that irrespective of the content of the opening or when it was given, he would be contending it was deficient, which is why opening statements are analyzed under the rubric of tactical decisions. Moreover, he has

failed to explain how not delaying the opening or changing its content would have probably resulted in a different verdict, particularly in light of the overwhelming evidence of his guilt.

L. Alibi Defense

Abdullah contends Toryanskis' decision to present a suicide defense as opposed to an alibi defense was ineffective. (Brief, pp.143-50.) As exhaustively explained by the district court (UPCPA, R., pp.8470-75), this was a tactical decision that was supported by significant investigation and research and driven by Abdullah repeatedly telling Toryanskis he was in Boise and the evolution of his story as the trial progressed.

Abdullah's claim is based primarily upon two witnesses, Lance Donnelson and Michael Quintana. Donnelson, a night clerk at the Maverick in Ogden, Utah, was interviewed by Detective Morgan on October 11, 2002, and reported a man looking like Abdullah was in the store on October 5, 2002, between 2:30 a.m. and 3:30 a.m. (UPCPA, R., p.6058.) Donnelson described the man as "being heavy set, with a mustache, speaking broke English." (Id.) However, Donnelson's description of the man was different when he was interviewed on October 8, 2003, by Abdullah's Salt Lake investigator, Steve Clark. (UPCPA, R., pp.3547-49.) At that time, Donnelson described the man as being in his "[l]ate 30's," "5'8" – 5'9," "[m]edium to large build (not slender)" with a "[l]arge belly," sporting a beard, and speaking with a "foreign accent; broken English." (Id., p.3548.) Neither description matched Abdullah who, at the time of his arrest on October 18, 2002, was not "heavy set," did not have a mustache, was only 25 years old, and did not speak with broken English (id., p.6069), which was confirmed by Abdullah's Boise investigator, Terry Murphy (UPCPA, Tr., pp.851-52). Additionally, based upon Abdullah's statements to his attorneys that he was in Boise at the time of Angie's murder, Donnelson's identification was a problem recognized by Murphy who, on October 14, 2004,

explained there was a problem having Donnelson testify because "now we have to maintain that he wasn't up here and that hurts our credibility. It's a catch 22. I think his testimony has to be very tight but he may not be willing or may be unable to say 'that was him, and I'm positive.' I think we have to know exactly what he is going to say." (UPCPA, R., p.2491.)

On October 19, 2004, Murphy sent Mitch an e-mail explaining he had spoken with Clark regarding an upcoming interview with Donnelson and indicated Donnelson had been previously shown a photo of Abdullah. (Id., p.3533.) Murphy stated that Clark "will determine the strength of [Donnelson's] I.D. and nail down what he will say. After Steve has thoroughly gone over his I.D.[,] Steve will show him the other photos to prepare him for court and seeing the A-man there. Donaldson [sic] will have to be prepared by you for his court testimony before he goes up just like any witness **but if he holds** to his I.D. I think it will be helpful." (Id.) (emphasis added). Obviously, not only did Murphy have concerns regarding Donnelson's identification, but there was clear indication Clark had been showing Donnelson photos of Abdullah and was molding his identification for trial. More importantly, Donnelson seeing Abdullah in Ogden was contrary to what Abdullah had been telling Toryanskis. Indeed, Abdullah denied being in the Maverick store. (UPCPA, Tr., p.854.) As recognized by Mitch, it was also inconsistent with what Abdullah told police when Abdullah said he was in the motel the entire night. (UPCPA, R., p.2949 (p.474).) There was no explanation for Abdullah being in Ogden at the time he was supposed to be in the motel with his son.

Additionally, Donnelson's timeline was not as solid as contended by Abdullah. Donnelson reported his recollection was based upon the man coming in the store "before the morning rush (4:00 AM – 4:30 AM) of workers from the Associated Foods Warehouse located nearby." (UPCPA, R., p.3547.) However, Donnelson worked until 7:00 a.m. that morning. (Id.)

Kim recognized Donnelson's timeline was not irreconcilable with Wood's identification of Abdullah around midnight in Mountain Home (UPCPA. Tr., p.318) and "was concerned that the timelines were not nailed down. There was some potential. There was some risk in that" (id., p.531). That concern was shared by Murphy who agreed, "it could have been somewhere in the neighborhood of 4:30 to 4:00 in the morning" and that "would have turned [] Donnelson into a very good State's witness." (Id., pp.854-56.) Moreover, after speaking with Toryanskis, Abdullah agreed an alibi defense was not a good decision. (Id., pp.53-33.)

That risk is further exemplified by Quintana's deposition testimony, who stated he heard the television and people's voices in the adjoining room at the hotel where Abdullah had rented a room. (UPCPA, R., pp.4307-08 (pp.9-14).) When Quintana was asked if he heard both the television and voices all night long, he explained, "The TV was all night long" and the voices were "intermittently." (Id., p.4308 (p.13).) Obviously, Quintana could not have heard intermittent voices throughout the night from Abdullah if Abdullah was in Ogden, as contended by Donnelson, or Boise, as Abdullah told his attorneys. Indeed, Quintana later explained he was uncertain whether the noise he heard from the adjoining room was actually voices or just the television. (Id., pp.4315 (p.44).) Moreover, Quintana's girlfriend, Molly Thompson, who was also interviewed by Clark, had a significantly different recollection of the events that night. Clark's report states Thompson "never once saw anyone in the next motel room, didn't ever see anyone lingering in the doorway, didn't hear any voices coming from next door (except the TV), and saw no young children or adult females around." (Id., p.6059.) While Thompson was utilizing Methadone on a daily basis, she explained, "it had no effect whatsoever on her memory, hearing or general cognitive abilities." (Id., p.6060.) She also noted Quintana "had a few beers" that evening, but "wasn't impaired." (Id., p.6059.)

Abdullah contends Shad Mohammad and Abdul Afridi would have supported an alibi because neither smelled gas on Abdullah when he was at the Mosque on the morning of October 5, 2002. (Brief, p.149.) However, Din, the Salt Lake Imam, testified when he was with Abdullah at 7:00 a.m. on Saturday, he was only four feet away from Abdullah and did not smell gas. (Tr., Vol.V, pp.165-66.) Clearly, any additional testimony from Mohammad or Afridi was cumulative and unnecessary.

Abdullah next contends the state's evidence supported the necessity of presenting an alibi defense because, "it was impossible for [Abdullah] have administered Prozac between ten o'clock and midnight because [he] had not reached Mountain Home by that time." (Brief, pp.149-50) (emphasis omitted). However, all of the evidence regarding the timing of the administration the Prozac was presented to the jury and rejected.

When witnesses undermine a defendant's testimony or present inconsistent alibis, "trial counsel's decision not to call them was a tactical one, falling within the wide range of reasonable professional assistance." Wright v. U.S., 979 A.2d 26, 30 (D.C. 2009). Moreover, "[c]ounsel does not render ineffective assistance by declining to pursue a strategy that is inconsistent with defendant's protestations of innocence or conflicts with his version of the events." Bohana v. Vaughn, 2008 WL 4614320, *29 (C.D. Cal. 2008) (unpublished); *see also* Com. v. Wallace, 724 A.2d 916, 922 (Pa. 1999) (counsel was not ineffective when defendant was unable to decide whether to present an alibi defense and the alibi witness would not be credible because her stories were inconsistent); Gilmore v. State, 712 S.W.2d 438, 441 (Mo. App. 1986) (failure to call alleged alibi witness did not constitute IAC, where witness' testimony was inconsistent and contradicted that of defendant). Indeed, counsel are not even required to investigate an alibi

defense when the alibi witnesses' testimony is inconsistent with the defendant's statements to counsel. Davis v. State, 9 So.3d 539, 548-49 (Ala. Crim. App. 2008).

The inconsistencies associated with Donnelson, Quintana, Thompson, and the evidence presented establish why Toryanskis' decision to focus upon an alleged suicide as opposed to alibi was an objectively reasonable tactical decision that cannot be second-guessed after he was found guilty, particularly based upon Abdullah's continually changing stories that have been discussed above. Not only was it important "to present his story without mandating that he get on the stand," which was a choice "left up to him" (UPCPA, Tr., p.506), but "the story that we wanted to tell had to be believable, it had to be plausible. And in order to make that case to the jury, we had to have some factual support" (id., p.1224). An alibi defense that was fraught with inconsistencies and extraordinary risks simply did not meet this mandate because, based upon all the evidence, it was even less plausible than the suicide theory that was presented and certainly would have alienated the jury. Based upon Abdullah's failure to establish the Toryanskis' decision regarding an alibi defense and which witnesses to call at trial was not the result of inadequate preparation, ignorance of the law, or other shortcomings capable of objective review, he has failed to establish deficient performance because those decisions were tactical in nature. Moreover, Abdullah has completely failed to explain, based upon the inconsistencies, a reasonable probability of a different result even if an alibi defense would have been presented.

M. Conceding Abdullah's Presence In Boise During Closing Argument

At the beginning of his closing argument, Mitch stated the following:

> Now, let me tell you right up front we are not going to be arguing that [Abdullah] did not drive to Boise on the morning of 5 October, 2002. We're not going to do that. Obviously there's evidence he did. But the essential thing you've got to know when deciding if the government's proved their charge here in this case is what happened inside that house because it is inside that house that Angela Abdullah died before the fire and it is in the garage of that house where

> the accidental ignition occurred. What happened inside that house and who beyond any reasonable doubt is responsible, that is the fundamental question that you'll have to decide.

(Tr., Vol.VIII, p.127.) At the close of his statement, Mitch argued, "While there's no evidence that [Abdullah] entered the house or the garage or that he poured any gas, the fact is that he lied to save face for his role and to avoid the shame that the disclosure of his activities would bring to his family." (Id., p.170.)

Abdullah contends Mitch's statement constitutes IAC because the concession was against his wishes and was tantamount to a confession. (Brief, pp.150-56.) Mitch's closing argument was well within the virtually unchallengeable arena of tactical decisions that are unassailable on review, particularly considering the evidence and Abdullah's concession to this very tactic. Abdullah has also failed to establish that, even if Mitch had not made the statement, there is a reasonable probability of a different result.

As previously discussed, "counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." Yarborough, 540 U.S. at 5-6. "Closing arguments should sharpen and clarify the issues for resolution by the trier of fact, but which issues to sharpen and how best to clarify them are questions with many reasonable answers." Id. at 6 (internal quotations and citations omitted). The Court recognized, "Focusing on a small number of key points may be more persuasive than a shotgun approach," and "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect" particularly "where a petitioner bases his ineffective-assistance claim solely on the trial record." Id. "Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment

guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Id. at 6. The Court expressly noted the words of Justice Jackson regarding closing arguments, "I made three arguments of every case. First came the one that I planned - as I thought, logical, coherent, complete. Second was the one actually presented - interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night." Id. (quoting Advocacy Before the Supreme Court, 37 A.B.A.J. 801, 803 (1951)).

Mitch's statement was not a confession or an admission of guilt; it was simply an acknowledgment of the overwhelming nature of the state's evidence that Abdullah was in Boise at the time of the fire. Indeed, Mitch explained that the essential question was, "[w]hat happened inside that house and who beyond a reasonable doubt is responsible" (Tr., Vol.VIII, p.127), which was followed with argument that there was insufficient evidence to prove Abdullah was even in the house or poured any gas (id., p.170).

Based upon the overwhelming nature of the state's case, Toryanskis had virtually no other option, particularly since the same jury was going to decide whether to impose a death sentence for Angie's murder. As explained in Florida v. Nixon, 543 U.S. 175, 192 (2004), in capital cases "counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed." In cases where the state's evidence is overwhelming, "avoiding execution may be the best and only realistic result possible." Id. at 191 (quotes and citation omitted). In Hovey v. Ayers, 458 F.3d 892, 906 (9th Cir. 2006), the court examined Yarborough, *supra*, Nixon, *supra*, and Bell v. Cone, 55 U.S. 685, 701-02 (2002), and concluded an attorney's statement, "I do think also it could be first degree murder and I recognize it also could be special circumstances," was a reasonable strategic decision that "preserve[d] his credibility in the eyes of the jurors."

Kim conceded the "concession" during closing arguments was driven, at least in part, by the stories they were told by Abdullah, including "that he came back here and that [Angie] was already collapsed." (UPCPA, Tr., p.537.) Abdullah was advised of the concession and that it would "really help his case and resonate with the jury." (Id., p.540.) Murphy recounted discussing the difficulty in closing arguments of saying Abdullah was not in Boise because of the overwhelming nature of the evidence and that Mitch "felt he would lose the jury in closing" without the concession. (Id., pp.800-01.) Mitch also agreed Abdullah was advised of this decision and that a Memo from Mitch and Kim would have been shared with Abdullah (UPCPA Tr., pp.1226-30), explaining, "we have prepared a defense for you that does not involve denying your presence at the scene" (UPCPA, R., p.3604). There is no merit to Abdullah's argument that he was not advised of this strategic decision. Irrespective, because it was not an admission of guilt, but merely an acknowledgment that he was in Boise, there was no need to obtain his permission. In fact, even when actual guilt is conceded, the defendant's permission is not always required. Nixon, 543 U.S. at 561 ("Cronin was not additionally required to gain express consent before conceding Nixon's guilt."). Abdullah's protestations to the contrary are clearly without a basis in law and his contention that the district court's findings regarding his credibility as opposed to Toryanskis' borders on being ludicrous.

Finally, in light of the overwhelming evidence supporting the concession, Abdullah has failed to establish a reasonable probability of a different result if Mitch had not made the statement. As in Hovey, 458 F.3d at 907, Mitch never recommended the jury find Abdullah guilty, but focused upon deficiencies in the state's case and conceded the obvious. While the court did not address prejudice (UPCPA, R., p.8475), nothing prevents this Court from finding Abdullah has failed to establish deficient performance **and** prejudice.

N. Advice Not To Testify

Prior to and during the course of Abdullah's trial, the subject of whether he would testify was repeatedly addressed by Toryanskis and Abdullah was asked what he wanted to say "so that we could shape things and -- would help that -- help that process." (UPCPA, Tr., pp.354-55.) However, because of the numerous stories Abdullah had told, fear of the prosecutor's cross-examination, and fear that he would perjure himself if he testified, Toryanskis strongly recommended against him testifying. (Id., pp.362-78.) Indeed, Kim felt the prosecutor's cross-examination "would be a crushing blow and probably a series of crushing blows and -- and that that would be something that would not be beneficial to the case" (id., pp.378-79) and may have resulted in evidence of the death of Abdullah's first wife being admitted (id., pp.378). Kim further explained, "if he were to testify and to undergo a grueling cross-examination and most likely a very effective cross-examination and right in front of the jury, I thought that that would be --that would leave very, very minimal opportunity to have credibility with the jury." (Id., pp.380-81.) As a result of Abdullah's different stories and concern regarding potential perjury if he testified, Toryanskis contacted bar counsel, Brad Andrews, regarding their ethical responsibilities. (Id., pp.452-54.) Andrews confirmed this conversation and that they reviewed ethical rules regarding defendants testifying in narrative form, which must be "assessed on a sliding scale dependent upon the nature of the criminal case." (UPCPA, R., pp.4014-15.) Kim "fretted" over Abdullah testifying "because it would be so -- it would be a very impactful thing for the jury to hear, you know, a completely different theory. . . . [T]rying to understand what he would do and predict was a very difficult thing." (UPCPA, Tr., p.523.) Nevertheless, Abdullah was advised it was ultimately his decision whether to testify, but as the time for his potential

testimony got closer, Toryanskis advised him that, because of their ethical concerns, his testimony "would be at least primarily in the narrative." (Id., 547.)

Mitch explained they asked Abdullah "a number of times . . . what do you want to tell the jury and sometimes he would share with me, well, I want to tell them about the relationship between my wife and I, I want to talk about the affair, things that really didn't -- didn't bear very closely on the issues of guilt or innocence." (Id., p.1142.) However, Mitch also noted Abdullah wanted their assistance to mold his testimony based upon the numerous different stories he told, stating, "He was trying to elicit from [us] . . . the facts that he needed to tell the jury so that we would achieve a good outcome in the case. . . . [W]hat stories do I need to tell, what magic words do I need to say so we can get a verdict of not guilty. . . . But we didn't know what those -- what that story would be and we certainly weren't going to make one up and -- and give him a script." (Id., pp.1142-43.) Abdullah was advised he would be the final witness. (Id., p.1145.) Immediately after the last witness testified, a recess was taken and a discussion occurred between Abdullah and Toryanskis regarding his decision. (Id.) The court advised Abdullah he was "the only person who can make a decision as to whether [he] testifies. . . . It's not a strategy decision by the defense counsel. They can give you advice, but it is your decision and your decision alone." (Tr., Vol.VII, p., 270.) During the recess, Abdullah presented his latest story about being in Salt Lake but followed by an unknown person at Angie's request who took various items from Abdullah's car. (UPCPA, Tr., 1146.)[38] Murphy confirmed Abdullah was again advised "about the pros and cons of him testifying and I believe Kim also talked to [] Abdullah some about why it wouldn't be a good idea for him to testify. I was asked my opinion by []

[38] Toryanskis' testimony regarding not knowing of Abdullah's latest story is confirmed by a post-it note from Abdullah that states, "Mitch, Kim you must know I was followed to Utah. I'm sorry - I know [this] is late." (UPCPA, R., p.8617, Exhibit E.)

Abdullah. I told him I didn't believe that it was a good idea for him to testify at court. But all of us said to [] Abdullah, but it's up to you. You can make the decision. You are the only one that can." (Id., p.765.) After the meeting, Abdullah returned to court with his defense team and advised the court he was waiving his right to testify and was aware he did not have to follow the advice of his attorneys. (Tr., Vol.VII, pp.871-72.) The defense then rested its case. (Id., p.872.)

At sentencing, after again being advised by the district court that it was only his decision whether to testify, Abdullah elected not to testify. (Tr., Vol.VIII, pp.370-71.) Even while dealing with the issues associated with his allocution, Abdullah was provided another opportunity to consult with Toryanskis after again being advised of his right to testify and that the court would reopen mitigation if he chose to testify after consulting with counsel. (Id., pp.426-27.) After a recess, the parties reconvened, but counsel requested the court to inquire of Abdullah's decision because he would not inform them of his decision. (Id., p.429.) After an extensive colloquy between Abdullah, his attorneys and the district court (id., pp.429-38), during which Abdullah asked numerous questions, the court explained it was uncomfortable "giving him legal advice" and asked if another recess was required resulting in Mitch stating, "We have explained and explained and explained," another recess was requested and granted even though Abdullah advised he wanted to testify (id., pp.435-38). Upon returning to the courtroom, the court again advised Abdullah of his right to testify and asked if he wanted to testify (id., pp.438-40), but he continued to play games stating, "Do what you have to do, Judge," "I cannot give you an answer because I do and I don't," "You just do what you have to do." (Id., pp.440-41.) Ultimately, the court found Abdullah waived his right to testify at sentencing. (Id., pp.441-42.)

Despite the ever-changing stories presented by Abdulla and the sound advice rendered by Toryanskis, Abdullah now contends they were ineffective because they "misled [him] about his

right to testify and coerced him into waiving his right to testify at trial and sentencing by refusing to question him if he did testify, and telling him he could tell his story through allocution without the risk of cross-examination." (Brief, p.156.) The state obviously does not dispute that Abdullah had an absolute right under the federal and Idaho constitutions to testify. But that right was waived, and Abdullah's current contention that he was "coerced" to waive his right to testify and that Toryanskis' advice was ineffective is ludicrous particularly in light of the record before this Court, which repeatedly demonstrates how the theories developed and the advice given by Toryanskis were extraordinarily limited because of Abdullah's evolving and changing stories even at the time of his final election to not testify at his trial.

In Nix v. Whiteside, 475 U.S. 157, 166 (1986), the Court explained that, while "counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." In addressing the question of whether the right of a defendant to effective assistance of counsel is violated "when an attorney refused to cooperate with the defendant in presenting perjured testimony at his trial," id. at 159, the Court recognized, "When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts," id., p.165. The Court further explained, "An attorney who aids false testimony by questioning a witness when perjurious responses can be anticipated risks prosecution for subornation of perjury." Id. at 168. Ultimately, the Court explained there was no ineffectiveness in counsel's representation, even though he actually threatened to withdraw if the defendant was going to

testify falsely, id. at 171, because there is no constitutional right to testify falsely, id. at 173 (citing Harris v. New York, 401 U.S. 222, 225 (1971)).

In State v. Waggoner, 124 Idaho 716, 721 (Ct. App. 1993), the court of appeals relied upon Whiteside in affirming the denial of a motion for mistrial when trial counsel advised the district court his client "would testify in narrative form and that counsel would not otherwise participate in presenting the testimony, implying that there was a basis to believe the testimony would be false." The court explained, "Waggoner's counsel, by his actions, compromised neither his client's rights nor his ethical obligations under the rules of professional conduct. Counsel met his duty of candor to the tribunal by advising of his client's intent to possibly perjure himself. By presenting his client's testimony in narrative form, counsel did not assist the perjury by his client."

While it is not entirely clear from his brief, it appears Abdullah does not dispute counsel is permitted to have a client testify in narrative form, but only if counsel has "actual knowledge of a client's perjury." (Brief, p.161.) The district court recognized the courts have adopted differing standards to determine what an attorney must "know before concluding a client's proposed testimony will be perjurious, including standards that require "good cause," "compelling support," "beyond a reasonable doubt," firm factual basis," "good faith determination," and "actual knowledge." (UPCPA, R., pp.8565-66.) Recognizing Idaho has not expressly addressed the issue, the court adopted the "firm factual basis" standard, concluding the "beyond a reasonable doubt standard" would "essentially eviscerate Rule 3.3(a)" of Idaho's ethical rules, be "virtually impossible to satisfy unless the lawyer had a direct confession from his client or personally witnessed the event in question," and "would also tend to compel defense attorneys to remain silent in the fact of likely perjury that a sharp private warning could nip in

the bud." (Id., p.8566) (quotes and citations omitted). This appears to be the standard adopted by the Ninth Circuit in U.S. v. Omene, 143 F.3d 1167, 1171 (9th Cir. 1998). As reasoned in Comm. v. Mitchell, 781 N.E.2d 1237, 1247-48 (Mass. 2003), "This standard satisfies constitutional concerns because it requires more than mere suspicion or conjecture on the part of counsel, more than a belief and more information than inconsistencies in statements by the defendant or in the evidence. Instead, the standard mandates that a lawyer act in good faith based on objective circumstances firmly rooted in fact."

Attempting to circumvent the district court's analysis, Abdullah contends it is contrary to the Idaho Rules of Professional Conduct. (Brief, p.161.) However, while those rules apply to the knowing presentation of false testimony, Toryanskis never prevented Abdullah from testifying, but merely explained they would require he testify in the narrative. Irrespective, while the state disputes Abdullah's interpretation of Idaho's ethical rules, the question is not whether Toryanskis violated ethical rules because they did not "know" what Abdullah would say if he testified or were not present to ascertain whether any portion of his proposed testimony was false, but whether their advice was reasonable under the circumstances. *See* Whiteside, 475 U.S. at 165 ("Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.").

Based upon the evidence presented, the district court made factual findings establishing Toryanskis had a firm factual basis for their belief that Abdullah would testify falsely, finding:

> Abdullah's trial counsel were not faced with mere discrepancies in details told to them by Abdullah at various times. Trial counsel were faced with direct and repeated admissions from Abdullah's own lips that he had been present at the scene and even moved the body. Those admissions, combined with the substantial evidence produced by the State, corroborated his presence, producing a firm factual basis for their belief. The Court finds the record amply supports a finding that trial counsel had a firm basis in objective fact for their good faith determination that Abdullah intended to commit perjury. They were justified in

> refusing to directly elicit such perjury and allowing him to testify in the narrative as their only choice.

(UPCPA, R., p.8567.)

While Abdullah refutes this finding, his argument is based only upon the district court's use of the "firm factual basis" standard; he does not challenge the court's finding that counsel were faced with more than "mere discrepancies in details" or Abdullah's statements that he was "at the scene and even moved the body." (Brief, p.162.) Because the court's use of that standard was not wrong, the findings are not clearly erroneous. More importantly, counsels' advice was not deficient irrespective of the standard because of the differing standards across the nation and counsel are not expected to "argue for a novel theory in an undeveloped area of law." Schoger, 148 Idaho at 630.

Apparently recognizing the futility of his claim, Abdullah further contends utilizing "narrative testimony" constituted ineffective assistance because "the truth or falsity of a defendant's testimony can be judged the same way all testimony is judged," and implying the district court used only one case to support its decision that narrative testimony is not ineffective. (Brief, pp.162-65.) Abdullah's argument ignores ethical rules and Idaho's implicit adoption of narrative testimony in Waggoner, 124 Idaho at 722, when the court of appeals explained, "By presenting his clients testimony in narrative form, counsel did not assist the perjury by his client."[39] Moreover, the district court's decision was not based exclusively upon Waggoner or People v. Johnson, 72 Cal. Rptr. 2d 805, 817-18 (Cal. App. 4 dist. 1998), but a plethora of jurisdictions that have "overwhelmingly concluded that requiring the defendant to testify in narrative form strikes an appropriate balance between preserving the defendant's right to testify

[39] Incredibly, Abdullah does not even mention Waggoner, let alone attempt to distinguish the court of appeals' decision.

on his own behalf and his right to counsel and counsel's ethical obligation to the court, and does not deprive a defendant of effective assistance of counsel so long as the defendant is otherwise vigorously defended." (UPCPA, R., p.8567) (citing cases). Indeed, Abdullah has failed to cite any case that has rejected this approach.

Finally, as repeatedly detailed above, based upon the overwhelming evidence presented by the state, Abdullah has failed to establish a reasonable probability of a different outcome even if he had testified under a traditional question and answer format, particularly if the testimony he would have provided involved his November 15 concoction that he never left Salt Lake on the night of Angie's murder, but was followed by some unknown individual at Angie's insistence who allegedly took various items from Abdullah's car and returned them to the fire scene. Not only was there no evidence to support this latest version, but Abdullah would have been destroyed during cross-examination with extensive impeachment evidence, resulting in an even faster guilty verdict by the jury and a different IAC claim by the SAPD challenging Toryanskis' recommendation to have Abdullah testify.[40]

O. Advice Regarding Allocution

The underlying basis of Abdullah's argument regarding Toryanskis' advice involving his right to allocute is that Mitch's "vague testimony was clearly erroneous and not supported by

[40] In an attempt to shift the burden of proof or raise a substantive as opposed to an IAC claim, Abdullah contends this Court must "evaluat[e] whether [Abdullah] proved he was deprived of his right to testify, and if so, whether the State proved beyond a reasonable doubt the deprivation was harmless," and "whether [he] was deprived of his right to the effective assistance of counsel based on the deprivation of his right to testify." (Brief, p.165 n.62.) To the extent Abdullah is raising a substantive claim regarding his right to testify, it has been waived because it is not supported by argument and authority, *see* Zichko, 129 Idaho at 263, but is merely being raised in a footnote. Moreover, his attempt to circumvent the burden of proof is contrary to Strickland, which requires that he prove both deficient performance and prejudice. 466 U.S. at 687. Finally, even if this Court addresses this claim substantively, it fails because Abdullah was never denied his right to testify, he voluntarily chose to waive that right, which he has not challenged.

substantial and competent evidence." (Brief, p.169.) In addressing Abdullah's claim that "misinformation" regarding his right to allocute caused him to waive his right to testify at trial and sentencing, the district court expressly found, "Based on the evidence produced during these post-conviction proceedings and trial counsel's credible testimony, the Court finds trial counsel did not tell Abdullah he could dispute the evidence produced in the guilt phase during his allocution." (UPCPA, R., p.8571.)

Most of the facts surrounding Abdullah's allocution decision are discussed in section XX above and incorporated herein. Moreover, the district court exhaustively addressed this claim (UPCPA, R., pp.8571-80), which is attached as Appendix B and incorporated herein. Additionally, "[t]he credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are matters solely within the province of the district court." Dunlap, 141 Idaho at 56. Likewise, the power to "resolve any conflicts in the testimony . . . is vested with the trial court." State v. Kirkwood, 111 Idaho 623, 625 (1986) (quotes and citation omitted). During his testimony, when asked if he encouraged Abdullah to allocute, Mitch explained, "I did. Remember offering to display pictures on an overhead for him which he could then discuss to talk about his family and -- and other various things he wanted to talk about." (UPCPA, Tr., p.1231.) While Mitch had difficulty remembering what he discussed regarding Abdullah's allocution during the trial, Mitch remembered "encouraging him to -- to allocute. As far as we told him what he could and could not say, I recall making notes when the Court set out the -- the rules and -- and explaining as best as I could what those rules were to him. . . . [W]e weren't telling him don't testify in the -- in the guilt phase because you'll be able to talk to the jury if it doesn't turn out so good." (Id., p.1232.) When asked by the district court,

"you don't remember telling him something like that," Mitch responded, "No." (Id.) When asked whether that was something Mitch would have advised, he again responded, "No." (Id.)

Admittedly, Kim testified they were interpreting the right to allocute "very broadly, that he would be able to -- he would be able to say what he wanted to say." (Id., pp.390-91.) However, it is unclear just how broadly it was being interpreted and exactly what Abdullah "wanted to say," and when asked if she ever advised Abdullah that he would be permitted to introduce evidence of his innocence during the allocution, Kim stated, "I don't remember specifically. I remember that there was some sort of hearing on the parameters of -- of what would be appropriate with the court." (Id., pp.391-92.)

Abdullah also places great weight upon Murphy's testimony, but Murphy clearly stated he could not "recall specifically" whether there was any discussion in the courtroom meeting about that, the allocution part," or that Abdullah would be permitted to "tell his story, whatever it is you want to talk about, and not be subject to cross-examination." (Id., pp.768-69.) While Murphy discussed a conversation he had with Mitch (id., pp.964-67), Murphy did not talk with Abdullah regarding the allocution (id., p.67). Additionally, Murphy explained he never heard of the term "allocution" and had no idea whether the discussion with Mitch involved an allocution before the jury for death penalty sentencing purposes or before the court for sentencing purposes on the other charges. (Id., pp.971-73.)

While the state submits there is not a conflict in the testimony, clearly it was for the district court to decide if a conflict existed and how to resolve the conflict. "A factual finding is clearly erroneous only if it is not supported by 'substantial and competent evidence in the record.'" Whiteley v. State, 131 Idaho 323, 326 (1998) (quoting Stuart v. State, 127 Idaho 806,

813 (1995)). Because there is substantial and competent evidence supporting the district court's finding, Abdullah's claim regarding the allocution fails.

However, even if the district court's finding is clearly erroneous, Abdullah's claim still fails because, based upon the uncertainty of the law regarding the content of an allocution in Idaho, any advice Toryanskis gave Abdullah would not constitute deficient performance. "A statement of allocution is an unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence." U.S. v. Jackson, 549 F.3d 963, 980 n.22 (5th Cir. 2008) (quotes and citation omitted). In light of the uncertainty surrounding the content of an allocution, it is difficult to understand how counsels' advice surrounding Abdullah's allocution could be deficient because counsel are not expected to "argue for a novel theory in an undeveloped area of law." Schoger, 148 Idaho at 630.

Finally, Abdullah contends prejudice should be presumed because "[c]ounsels' interference with [Abdullah's] right to testify during the guilt phase of the trial created a ripple effect of prejudice, which prevented [him] from exercising his right to testify during the penalty phase and from exercising his right to allocute." (Brief, p.170.) This claim is without merit. For Abdullah to prevail on his IAC claim, he must establish a reasonable probability of a different result. Dunlap, 2013 WL 4539806, *37. Additionally, contrary to his contention (Brief, pp.17-71), the record does not demonstrate Abdullah was "highly frustrated" by the events surrounding his testifying and allocution, but that he is very intelligent and highly manipulative. Indeed, when Kim was asked by the district court regarding Abdullah's involvement in his case and whether "he was thinking beyond just the case itself, but going to potential appeals, et cetera," Kim responded, "It seemed to me that that's where his mind was" and that she considered

Abdullah "to be a very smart individual." (UPCPA, Tr., p.542.) In light of the overwhelming aggravation evidence and the *de minimus* value of a proper allocution, Abdullah has failed to establish the outcome of his sentencing would have been different.

P. Voir Dire

Abdullah contends Toryanskis were ineffective because they failed to properly utilize the "Colorado Method" of selecting a jury, retained Jurors 59 and 83 who were allegedly biased, improperly stipulated to excusing Jurors 12, 15, 64, 75, 82, 117, and 154 prior to voir dire based upon the jury questionnaire form, and by completing inadequate voir dire with respect to Jurors 28, 36, 44, 45, 68, 81, 96, and 98. (Brief, pp.171-90.) Not only has Abdullah failed to establish deficient performance and prejudice, but the juror questionnaire forms are not part of the record before this Court, which are, therefore, presumed to support the district court's decision denying post-conviction relief. Stuart, 145 Idaho at 471. Moreover, Abdullah has failed to explain how the district court erred by rejecting these claims. (UPCPA, R., pp.8445-67.) Abdullah's challenges to voir dire can only be categorized as overzealousness and the state will not waste either its resources nor this Court's by responding to each allegation regarding virtually every juror, particularly since Abdullah's claims are based upon questionnaires that are not part of the record and inadmissible affidavits from two "experts," David Lane and Teresa Hampton, neither of which will "assist the trier of fact in understanding the evidence." *See* State v. Pearce, 146 Idaho 241, 245-46 (2008).[41]

"The choice of questions to ask prospective jurors during voir dire is largely a matter of trial tactics. Such strategic or tactical decisions made by trial counsel will not be second-guessed on post-conviction relief, unless those decisions are made upon the basis of inadequate

[41] The district court addressed each of Abdullah's claims (UPCPA, R., pp.8445-68) and its decision is attached as Appendix C and incorporated in its entirety.

preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." Milton v. State, 126 Idaho 638, 641 (Ct. App. 1995); *see also* Porter, 130 Idaho at 793 (counsel's decision that challenges were unnecessary will not be questioned on appeal); Echols v. State, 127 S.W.3d 486, 502-03 (Ark. 2003) ("This court will not label counsel ineffective merely because of *possible* bad tactics or strategy in selecting a jury.") (emphasis in original).

Abdullah's complaints regarding the "Colorado Method" are unavailing because there is no authority supporting the notion that a specific "method" of selecting a jury must be utilized in capital cases. As explained in In re Yates, 296 P.3d 872, 896 (Wash. 2013) (quoting Strickland, 466 U.S. 688-089), "Yates' presumption that the Colorado method is the only approach to jury selection that is constitutionally adequate lack any support. Indeed, it goes against the Supreme Court's holding in *Strickland*," which states, "'No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.'" This is particularly true in Abdullah's case since the Colorado Method is designed only with sentencing in mind. As explained by Abdullah's "expert," David Lane, "During voir dire, a defense attorney's goal is three-fold: first, the attorney must identify pro-life and pro-death jurors; second, counsel must empower the jurors to maintain their personal moral decisions in the jury room and to respect those of the other jurors; and third, counsel must establish pro-death jurors as challenges for cause to avoid unnecessary reliance on peremptory challenges." (UPCPA, R., p.5449.) Lane's

affidavit ignores guilt or innocence, presuming the jury is going to convict at the guilt-phase and the only important aspect is sentencing. (Id., pp.5442-5501.)

This ludicrous hypothesis was not lost on Toryanskis who recognized the importance of choosing a jury that would examine the evidence and return not guilty verdicts. Kim conceded, "the Colorado Method focuses entirely on the penalty phase," and they had a "goal of guilt phase success also" resulting in the Colorado method not being in "perfect harmony" with their goals because they "were working very vigorously on the guilt phase as well." (UPCPA, Tr., p.499.) Kim explained, "What's also important in jury selection is how the jurors react to counsel. . . . [I]f you can make a connection, you know, if you can -- if you see they're grasping information and you're presenting it in a way that will be meaningful to them, I mean, there has to be -- there has to be some level of ability to -- to -- have some effective communication with the juror as you present evidence and testimony." (Id., pp.503-04.)

Mitch confirmed the Colorado method is "all about the death penalty. It wasn't about guilt or innocence." (Id., p.1034.) Mitch explained that in choosing a jury "you have to take the totality of -- of the circumstances into account. So I don't know if their smile would be wide enough and bright enough to overcome those things, but we would just be considering everything together and comparing that prospective juror to the other people we were interviewing." (Id., p.1055.) Mitch also remembered "being very focused on preparing and trying to pick the very best jury possible." (Id., p.1056.) While Toryanskis used the Colorado Method, Mitch explained other factors were also used because the Colorado Method was only "one piece of the puzzle. We also have decades of living on this earth, working closely with people from every economic background, every -- every religion, every background imaginable. You know, we have our experiences, interpersonal experiences and were not going to disregard

those because of a number that a system will result in." (Id., p.1188.) While Toryanskis "weren't happy with the panel, but that -- that wasn't due to any mistake or miscalculation," but "that they were not as sympathetic, touchy-feely, anti-death penalty as I -- as we would have hoped for." (Id., pp.1191-92.) Further, like most trial attorneys, Mitch "was not happy with the number of and type of questions that [he] asked. The mechanics, however, [he] was satisfied with." (Id., p.1192.) However, Mitch also explained this was due to his "line of questioning [being] cut short and – and continually, you know, being charged and questioned by the Court on my line of questioning." (Id., p.1287.) Because Mitch wanted to maintain credibility with the jury, he limited his questioning and did not "push the envelope" and make it look like he did not "know what [he] was doing or [] trying to get away with something." (Id., pp.1287-88.)

Apparently, recognizing the futility of challenging Toryanskis' attempt to use the Colorado Method, Abdullah also contends Toryanskis' voir dire resulted in the seating of Jurors 59 and 83 who should have been excused for alleged bias. (Brief, pp.176-79.) The state has already explained why Abdullah has failed to establish Jurors 59 and 83 were actually biased in section II(D) above. And Abdullah has failed to establish Toryanskis' tactical decision to not use a peremptory challenge on either juror was objectively unreasonable, particularly since it was not based upon a lack of preparation or research.

Abdullah next challenges Toryanskis' stipulation to dismiss for cause various jurors based only on their questionnaires. (Brief, pp.179-83.) Not only has Abdullah failed to provide the completed questionnaires as part of the record, but he declines to address the issue "in depth; rather counsel cites to and incorporates by reference the Final Petition as it relates to each juror." (Brief, p.181.) This attempt to circumvent the page limitations for his appellate brief should not be tolerated by the Court, which "will not search the record on appeal for error," Hopper, 2013

WL 6198945, *3, because "I.A.R. 35 requires that issues and arguments thereon be presented in the parties' briefs, Hoisington, 104 Idaho at 159. Because the questionnaire forms are not part of the record on appeal and that is the sole basis of Abdullah's claim, the state relies on the district court's analysis (UPCPA, R., pp.8445-68), which is attached as Appendix C.

Abdullah's remaining claims regarding voir dire involve eight of the seated jurors and taking snippets from their questionnaires and voir dire to contend Toryanskis were ineffective. (Brief, pp.183-89.) Respecting Juror 28, Abdullah contends this juror "made comments suggesting he would be a favorable State juror," but then changes his argument to contend voir dire was inadequate because the juror should have been questioned further to ascertain whether a challenge for cause was proper or use of a peremptory challenge. Abdullah's argument establishes a fundamental misunderstanding regarding capital jurors; as explained in Section II above, merely because someone is "a favorable State juror" does not constitute bias resulting in cause. Addressing his/her feelings regarding the death penalty, Juror 28, explained:

> That is a deep philosophical question that you are asking me, how I feel about it. This isn't the movies. This is a real-life situation. It's going to be -- I would just have to look at it at the time I was going through it after I learned everything. I'm trying to answer to the best of my ability. I would -- the death penalty in some cases in society to protect society would probably be the correct way to go.

(Tr., Vol.II, p.428.) Juror 28 recognized there are other alternatives to protecting society, and explained his rationale for being a seven on a scale of ten in favor of the death penalty, "We're usually not placed in a situation where we are going to place judgment on a man's life and that is a very difficult position to put anybody in that's going to be realistic about their decisions." (Id.) Juror 28 conceded his/her "personal feelings will be modified by the testimony that's given, and, in fact, my personal feelings need to be put aside and I need to focus in on what we are discussing if I do get chosen. No, personal -- no, I can't allow personal feelings to really

override what's being said." (Id, p.429.) When asked what some of the circumstances would be for Juror 28 to impose the death penalty, he/she stated, "It depends upon the case, you know, if it's -- I don't know, if it was mass murder or murder where it was just violently done and destruction of another human being with forethought. I don't know. There's so much to go into this that I really can't speak upon it until I have worked on it, being -- the material being given to me and I have a chance to assimilate it." (Id., pp.429-30.) Finally, Juror 28 explained, "The death penalty would be the last choice that I would make." (Id.)

In light of the answers given to Mitch's voir dire, Abdullah's claim that Juror 28 was a "pro-death penalty juror" is truly extraordinary and illustrates the overzealous nature of Abdullah's challenges to every aspect of Toryanskis' representation from the time they substituted for Cahill and Myshin to the imposition of sentencing. Abdullah's challenge to Mitch's voir dire of Juror 28 is without merit.

Explaining why he/she was an eight of ten favoring the death penalty, Juror 36 stated, "I think because on an average person, I'm probably higher than somebody who doesn't believe in it at all. I figure I am probably more than just – I'm probably slightly above middle and eight just looked like a good number." (Id., p.562.) Juror 36 had "no idea" what mitigation involved, but explained that lack of a criminal record and providing financially for family "shows part of a person's personality and person, shows some character." (Id., p.563.) When asked his/her feelings about having to contemplate imposing the death penalty, Juror 36 stated, "Quite honestly, I was thinking about this. I would -- I would with great remorse go for it" and would not impose the death penalty until after weighing the law and facts regarding all of the circumstances. (Id., p.558.) Finally, Juror 36 not only agreed to follow the courts instructions

regarding the death penalty, but agreed the death penalty need not be imposed for all first-degree murders and would consider not imposing the death penalty in Abdullah's case. (Tr., p.551.)

Explaining why he/she was a six of ten favoring the death penalty, Juror 44 explained, "Because I'm not as convicted [sic] as I was a few years back and I still believe that it has its place." (Id., p.649.) Juror 44 was willing to consider mitigation and explained that while in the military he/she worked with people from the Middle East and the experience was "just like any other experience, no problems at all, good people." (Id., pp.649-50.)

Juror 45 also agreed the death penalty was not the only appropriate penalty for first-degree murder and while he/she was unsure how aggravation and mitigation was defined, was "willing to weigh the facts as you present them to come to that conclusion." (Id., p.657.) Juror 45 was "[m]ost definitely" willing to go into deliberation with the idea of considering both aggravation and mitigation and his/her views on imposition of the death penalty would not prevent or substantially impair Juror 45's ability to follow the court's instructions. (Id., p.658.) Juror 45 agreed he/she was "a pretty accepting person of the differences between people" (id., p.674), an important attribute considering Abdullah's cultural history. While Abdullah correctly notes Mitch did not question Juror 45 regarding the death penalty, the important questions under Witherspoon v. Illinois, 391 U.S. 510 (1968), Wainwright v. Witt, 469 U.S. 412 (1985), and Morgan v. Illinois, 504 U.S. 719 (1992), were addressed by the district court. (Id., pp.640-42.)

Abdullah concedes Juror 68 "expressed general opposition to the death penalty" in his/her questionnaire and that "'everyone deserves a second chance.'" (Brief, p.186.) Juror's 68's feelings regarding the death penalty were reaffirmed during voir dire. (Tr., Vol.III, pp.45-46.) Jury 68 responded, "Certainly," when asked if he/she would consider other circumstances surrounding the death penalty. (Tr., Vol.III, p.61.) Nevertheless, while conceding Juror 68 is an

"example of someone who would likely be moved by mitigation and would be inclined to vote for a life sentence," Abdullah contends Juror 68 should have been asked questions to "educate the juror on preserving [his/]her personal moral integrity through a jury verdict" because "it is precisely this sort of juror, who, unless empowered to maintain [his/]her personal moral judgment, may submit to the will of the majority for the purpose of reaching a unanimous verdict in favor of the death penalty." (Brief, pp.186-87.) Abdullah's claim is incredible; there is absolutely no legal basis for contending an alleged failure to "empower a juror" constitutes deficient performance or is even permitted during voir dire. Moreover, Abdullah's claim is based upon rank speculation and completely unsupported by the record. It appears Abdullah's belief regarding voir dire is to exhaustively question jurors until there they become so frustrated with the process that there is an actual basis for their disqualification for cause by either the state or defendant and there are no jurors to hear the case. This clearly is not the status of existing law, but is premised upon a hope that voir dire be extended to the point that people simply make up excuses to avoid jury service in capital cases.

Mitch inquired of Juror 81 regarding service in the Marine Corps (id., pp.307-08), an important area of inquiry considering Mitch's experience in the military. Juror 81 also had experience with "folks from the Middle East," which was reported as "[p]ositive with all of them. Good workers." (Id., pp.309-10.) When the prosecutor questioned Juror 81's ability to follow the law regarding the death penalty, he/she responded, "I will be very deliberate now that it's done. The way I see it is I try to put myself in that man's position. If that was me sitting there, I would want people to look at everything and weigh it very carefully. I figure at the very least, the man has the potential of the death penalty hanging over his head. And I know if that was me, I would want everybody to look at everything very hard." (Id., p.307.) There was no

basis for challenging Juror 81 for cause and the questions asked by the court, prosecutor, and Mitch were sufficient.

Abdullah's challenge to Juror 96 is identical to his challenge to Juror 68. Despite Juror 96 rating himself/herself a five of ten in favor of the death penalty and conceding Juror 96 is "an example of a juror who would be amenable to real consideration of mitigating evidence," Abdullah contends he/she "needed to be empowered to render her moral judgment and feel comfortable with it." (Brief, pp.187-188.) As with Juror 68, Abdullah's argument is supported neither by the law nor facts. Abdullah has failed to establish Mitch's voir dire was deficient, particularly since voir dire is tactical.

When Juror 98 was asked, "Are you of the opinion that death is the only appropriate penalty for murder in the first degree," he/she responded, "Absolutely not" even if premeditated murder is proven by the state. (Id., p.562.) Juror 98 agreed the death penalty is not required in all first-degree murder cases and was willing to consider not imposing the death penalty. (Id., pp.562-63.) Importantly, Juror 98 agreed his/her views would not prevent or substantially impair the juror's ability to follow the court's instructions. (Id., p.563.) During Kim's voir dire, Juror 98 explained why he/she was a seven out of ten in favor of the death penalty, "I think depending on the situation, I -- like I said earlier, I think depending upon what has transpired, I think that I could say that yes, the death penalty is warranted. I don't feel that 100 percent comfortable doing it every time. If that's what I indicated, I maybe misspoke. But what I feel is if there are some really horrible things that people be, I think that is the way it should be," clarifying "[i]n certain circumstances, exactly." (Id., p.579.) Importantly, Juror 98 agreed to listen to the court's instruction on mitigation and keep an open mind. (Id., pp.579-80.) Abdullah scoffs at Juror 98's promise to follow the law, contending "the goal is not to obtain a meaningless promise from a

suspected ADP juror, but to reveal jurors who will automatically impose the death penalty and who [are] substantially impaired in [their] ability to give meaningful consideration to mitigation." (Brief, p.189.) This statement demonstrates a fundamental misunderstanding of voir dire and what is required of counsel. As recently explained in Dunlap, 2013 WL 453908, *29 "In determining whether a juror can, in fact, lay aside previous opinions and impressions, the district court is entitled to rely on assurances from [the potential juror] concerning partiality or bias," although those assurances are not always dispositive." Because there is no indication Juror 98's promise was "meaningless," Abdullah's argument should be rejected.

Abdullah's underlying argument is also premised on the mistaken belief that counsel must ferret out every juror who is willing to consider imposing the death penalty because Toryanskis' voir dire failed to find "even one juror who would vote for life." (Brief, p.189.) Again, this is not the law associated with voir dire or the selection of juries in capital cases. As confirmed by the Ninth Circuit, "A defendant has a constitutional due process right to remove for cause a juror who will **automatically vote** for the death penalty." United States v. Mitchell, 502 F.3d 931, 954 (9th Cir. 2007) (citing Morgan, *supra*) (emphasis added). In Mitchell, although the juror responded to a question "indicat[ing] that she thought the only punishment for certain kinds of 'horrific crimes should be death,' she later qualified that response by indicating, 'well, death or imprisonment.' Thereafter she said in a number of ways that she could keep an open mind." 502 F.3d at 955. The Ninth Circuit was clearly examining the entirety of the juror's responses and not focusing exclusively upon her response to a single question.

Similarly, in Treesh v. Bagley, 612 F.3d 424, 438 (6th Cir. 2010) (quoting Morgan, 504 U.S. at 729), the Sixth Circuit recognized that cause could be established only if the juror "'will automatically vote for the death penalty in every case'" because such jurors "'will fail in good

faith to consider the evidence of aggravating and mitigating circumstances as the instructions require.'" Although a juror initially stated she thought anyone guilty of murder should not be "up and walking around," her other responses indicated "she did not believe that everyone who purposely murdered should be sentenced to death." Id. As a result of all of the juror's statements, the Ninth Circuit concluded, "These statements suggest that [the juror] would not 'automatically vote for the death penalty in every case,' and demonstrate that she could take into consideration mitigating factors." Id. at 438-39.

Moreover, a juror's equivocal answers regarding imposition of the death penalty do not establish a vote for "automatic" imposition of the death penalty. In Bowling v. Parker, 344 F.3d 487, 520 (6th Cir. 2003), the court detailed some of the jurors' answers which were equivocal, and concluded, "Though we recognize this is a close question, ultimately Livingston is not an 'automatic death penalty' juror within the meaning of *Morgan*. Livingston did initially state that he would automatically give the death penalty to those who met the aggravating factor, but later he expressly said that he would consider mitigating evidence." *See also* Bartee v. Quarterman, 574 F.Supp.2d 624, 667 (W.D. Tex. 2008) ("Ms. Jones' ambiguous and vacillating answers regarding her personal opinion on the applicability of the death penalty did not establish she was unwilling or unable to consider all relevant mitigating evidence in answering the capital sentencing special issues.").

This basic principle follows the general rule that the trial judge is permitted to resolve ambiguous and contradictory answers from jurors in determining juror bias. As explained in Patton v. Young, 467 U.S. 1025, 1038-39 (1984), when jurors' answers are ambiguous and contradictory, which is not unusual, "it is [the] judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those

statements that were the most fully articulated or that appeared to have been least influenced by leading [questions]." This determination "is essentially one of credibility, and therefore largely one of demeanor." Id. at 1039.

Abdullah has failed to establish Toryanskis' voir dire was deficient. Counsel were not required to focus their voir dire only upon the death penalty, but were permitted to make tactical decisions regarding the questions asked of each prospective juror, which are unassailable on review. More importantly, Abdullah has failed to articulate exactly what additional questions should have been asked or how asking such questions would have resulted in a reasonable probability of a different outcome.

Q. Jury Instructions

Abdullah contends that during the guilt and penalty phases, Toryanskis failed to object to erroneous instructions or request proper instructions. (Brief, pp.190-91.) Because Abdullah has failed to expressly articulate which instructions were erroneous or which instructions should have been requested, it is assumed he is referring only to the instructions in section IV, which involves guilt-phase instructions, and section XIX, which involves sentencing-phase instructions. Because Abdullah has failed to present additional argument regarding why Toryanskis' performance was deficient or prejudicial, but relies only upon his prior substantive arguments, the state will likewise rely upon its prior arguments. Because there is no substantive error associated with the instructions, not only has Abdullah failed to establish deficient performance, but he has failed to establish prejudice. However, even if there was deficient performance, because of the overwhelming nature of evidence establishing Abdullah's guilt, he has failed to establish a reasonable probability of a different outcome if Toryanskis had objected to the instructions or requested additional, unknown, instructions.

CONCLUSION

The state respectfully requests that Abdullah's judgments of conviction, death sentence, and denial of post-conviction relief be affirmed.

DATED this 30th day of December, 2013.

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, this 30th day of December 2013, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SHANNON N. ROMERO
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

APPENDIX A

NO. _____
A.M. 1158 FILED P.M.
JAN 0 3 2005
J. DAVID NAVARRO, Clerk
By _____ DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO

Plaintiff,

vs.

AZAD HAJI ABDULLAH

Defendant.

CASE NO. H0201384

SCOPE OF ALLOCUTION/TESTIMONY DURING SENTENCING PHASE

After the Defendant, Azad Abdullah, rested his mitigation case during the sentencing phase of this trial, Abdullah told the Court he wanted to exercise his right to allocute[1] to the jury, in response to the Court's careful questioning. The Court heard argument and engaged in extensive discussion with Abdullah and his counsel and ruled Abdullah could allocute to the jury and ask for mercy. The Court further ruled he could not present factual evidence in the form of his unsworn allocution.

After learning the Court placed some limits on his allocution, Abdullah elected not to allocute. However, Abdullah indicated he wanted to take the stand and testify about matters already decided during the guilt phase of the trial. The Court ruled that if Abdullah wanted to testify and introduce facts relevant to the sentencing phase, the defense could reopen its mitigation case so Abdullah could testify regarding factual issues relevant to the sentencing phase. However, the Court ruled he could not introduce new evidence concerning guilt because his guilt had already been determined and, therefore, such evidence would be irrelevant. Abdullah decided to

[1] Allocution is not made under oath and is not subject to cross-examination. Allocution has been described as "the right of the defendant to stand before the sentencing authority and present an unsworn statement in mitigation of sentence, including 'statements of remorse, apology, chagrin, or plans and hopes for the future.' " *see Homick v. State*, 825 P.2d 600, 604 (Nev. 1992); *DeAngelo v. Schiedler*, 757 P.2d 1355, 1358 (Or. 1988)).

not testify with those restrictions. This memorandum reflects the Court's reasoning and is hereby made part of the court record.

A. The right to allocute does not include the right to introduce evidence through an unsworn statement not subject to cross-examination.

Whether a convicted defendant in a capital murder trial has the right to allocute in front of the sentencing jury is one of first impression in Idaho. Clearly, a defendant has a right to address the sentencing judge prior to the imposition of sentence. I.C.R. 33. "Allocution is so important a right that a court's failure to meet its obligation to allow a defendant the opportunity of allocution should be subject to challenge on appeal as fundamental error." *State v. Gervasi*, 138 Idaho 813, 816, 69 P.3d 1074, 1077 (Ct. App. 2003). The Idaho Court of Appeals in *Gervasi*, opined as follows:

> while a denial of allocution has not been held to constitute a denial of due process under the United States Constitution, and therefore does not implicate a federal constitutional right, like those waived by a guilty plea, states are free to provide greater protections than those afforded at the federal level. [citations omitted] We are persuaded that allocution is so important a right that a court's failure to meet its obligation to allow a defendant the opportunity of allocution should be subject to challenge on appeal as fundamental error.

138 Idaho at 816, 69 P.3d at 1077; *See also Boardman v. Estelle*, 957 F.2d 1523 (9th Cir. 1992) (due process requires allocution to a sentencing judge). Neither the Ninth Circuit nor Idaho has considered whether a defendant has a right to allocute to a sentencing jury. Other jurisdictions have ruled defendants have no due process right to allocute to a sentencing jury, even in capital cases.[2] Thus, this is an issue of first impression. Based upon Idaho's right of allocution expressed in I.C.R. 33(a)(1) and *Gervasi,* the Court ruled that Abdullah did have the right to allocute in front of the jury but that this right was not unlimited.

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[2] The Fourth and Fifth Circuits have both ruled a defendant does not have a due process right to allocute before a jury determining whether the death penalty will be imposed. *See United States v. Barnette*, 211 F.3d 803, 820 (4th Cir. 2000); *United States v. Hall*, 152 F.3d 381, 391 (5th Cir. 1998) *cert. denied*, 526 U.S. 1117, 119 S.Ct. 1767 (1999). (*overruled on other grounds*). The Fifth Circuit held "a criminal defendant in a capital case does not possess a constitutional right to make an unsworn statement of remorse before the jury that is not subject to cross-examination." *Hall*, 152 F.3d at 396. The Fourth Circuit likewise held that although a defendant had a due process right to address a sentencing judge, the right to allocute by making a statement of remorse did not apply when the allocution would be made to a sentencing jury. *Barnette*, 211 F.3d at 820.

Idaho Criminal Rule 33(a)(1) gives Abdullah the right to "make a statement and to present any information in mitigation of punishment." However, Abdullah told the Court at the sentencing hearing (outside the hearing of the jury) that he wanted to present evidence as part of his allocution. In particular, he intended to challenge Steven Bankhead's testimony as untrue, further challenge evidence presented during the guilt phase and present new evidence regarding his guilt without being subject to cross-examination or being sworn.[3] The State objected. There is no Idaho case law on the issue of allocution or its limits during a jury sentencing for capital murder.

Abdullah indicated he did not intend to make a statement of remorse, or even attempt to gain the jury's sympathy by stating how much he loved his family, or to show mitigating circumstances. Abdullah's stated intent was to give testimony regarding his guilt without being under oath or subject to cross-examination. The Court, therefore, requested Abdullah, like it required the victims presenting victim impact statements,[4] to write his allocution so that his attorneys and the Court could review it to limit the risk of error. Abdullah only presented the Court with an outline of the areas he intended to cover.[5] For the reasons stated below, the Court found allowing him to in effect testify without being subject to cross-examination or being sworn would be error.

When asked to consider a defendant's request to present "evidence" during his allocution to a jury in a capital case, the Fourth Circuit upheld a North Carolina decision denying the defendant that right and "concluded that there was no constitutional right to allocution, at least where, as in Green's case, the defendant seeks to use allocution as a vehicle for presenting unsworn (and often factual) testimony to the sentencing jury without subjecting himself to government cross-examination." *Green v. French*, 143 F.3d 865, 877 (4th Cir. 1998) *cert. denied*, 525 U.S. 1090 (1999), *abrogated on other grounds* by *Williams v. Taylor*, 529 U.S. 362,

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[3] He also wanted to tell the jury his trial was unfair and that his wife wanted her family to accept her conversion to Islam. The Court ruled that this information was not relevant to mitigation.

[4] The Court required any victim impact statements to be in writing and subject to pre-approval. The victims were placed under oath, subject to cross-examination, and only allowed to read their statements to assure they did not inadvertently exceed the scope of what they were allowed to say.

[5] He wanted to talk about his wife's desire that her family accept her conversion to Islam, attack the fairness of the trial, explain why he was not guilty, and challenge Bankhead's testimony.

120 S.Ct. 1495 (2000). Several state courts have also considered the issue of the proper scope of allocution.

For example, the New Jersey high court held "a defendant is permitted to make a brief statement in order to allow the jury to ascertain that he or she is an individual capable of feeling and expressing remorse and of demonstrating some measure of hope for the future." *State v. Loftin*, 680 A.2d 677, 709 (N.J. 1996)(citing *State v. Zola*, 548 A.2d 1082 (1988)). However, a New Jersey defendant, "is not authorized to argue legal points, advance or dispute facts, or attempt to exculpate himself." *Id.* If the defendant strays from these constraints he "will be subject to corrective action by the court including either comment by the court or prosecutor or in some cases possible reopening of the case for cross-examination." *Id.* (*quoting State v. Zola*, 548 A.2d at 1022). Moreover, "should a defendant dispute facts in issue or offer other facts to exculpate himself, defendant 'will be subject to corrective action by the court including either comment by the court or prosecutor or in some cases possible reopening of the case for cross-examination.'" *Id.* at 1022. The New Jersey court opined:

> "the purpose of allocution is twofold. First, it reflects our commonly - held belief that our civilization should afford every defendant an opportunity to ask for mercy. Second, it permits a defendant to impress a jury with his or her feelings of remorse." However, a defendant's allocution should not take on a testimonial color. To allow defendant to testify about mitigating or aggravating factors without permitting the State to cross-examine him would be unfair to the State and could have the effect of misleading the jury.

Id. at 1022 (quoting *Zola*, *supra*). In *Zola*, *supra*, the New Jersey high court held that the trial court could take corrective action which might include comment by the court or prosecutor, or, in some cases, reopening the case for cross-examination. *Id.* at 1022.

In *State v. Lord*, 822 P.2d 177, 216 (Wash. 1991) *cert. denied*, 506 U.S. 856, 113 S.Ct. 164 (1992), the Washington Supreme Court likewise held that when the defendant exceeds the scope of allocution, the appropriate remedy is to allow the prosecution to cross-examine the defendant. Similar to Abdullah's intended allocution, Lord sought "the right, at the end of the penalty phase of the trial, to present evidence on the issue before the jury which would be uncross-examined, unsworn, unrebuttable and unanswerable by argument." *Id.* The Washington Court wrote:

> During his statement to the jury, Lord said that he had never asked anyone to lie for him. He denied making the statements to which the jail trustees testified. He said that law enforcement officers had 'changed around' statements he made to them. He then stated: "then there was, since I didn't get to testify, my lawyers thought that was the wrong thing for me to do, which I wanted to but I was told not to, and I just would have liked to have been able to testify to be able to say my part of the story, you know. Because after I left the Fryes' house, September 16th, I went to my brother's, straight to my brother's, and from there I never left my brother's property, never." He went on to relate his problems with drugs and alcohol and his prior criminal history, including facts about the unlawful imprisonment conviction. He concluded by stating that the County, the police and the prosecutor had lied during trial.

Id. at 217. After this statement, the trial judge allowed the prosecution to cross-examine Lord "regarding his statement that he had not asked any witness to lie for him, his statement regarding leaving the Fryes', and his prior criminal record." *Id.* The Washington Court held that, in essence, Lord did not allocute but gave testimony, thus opening himself up to cross-examination. *Id.* Abdullah likewise wanted to introduce evidence.

The Washington Court has also held it would be a misuse of the right to allocute for a defendant to go beyond a plea for mercy and begin discussing the crime itself. *Matter of Personal Restraint of Benn*, 952 P.2d 116, 127-28 (Wash. 1998). In *Benn,* similar to what Abdullah intended to do, the defendant "began his allocution by saying 'the truth never came into this trial. I was convicted by three false witnesses,' and then proceeded to give unsworn testimony as to his version of events." *Id.* at 128. The Washington Court found that the only legitimate purpose for allocution is for defendant to express remorse and ask for mercy. The Washington Court further observed that in instances when the scope of allocution is exceeded, the defendant may be cross-examined. *Id.* at 127.

In another case with facts analogous to those before the Court, the Nevada Supreme Court ruled similarly. *Echavarria v. State of Nevada*, 839 P.2d 589 (Nev. 1992). Echavarria was convicted of first degree murder and sentenced to death for killing an FBI agent. *Id.* at 591. During the penalty phase, Echavarria decided to allocute to the jury. "The district court agreed to allow such a statement, but cautioned that Echavarria could not attempt to dispute facts in issue or offer facts to exculpate himself. Echavarria decided that he could not effectively express himself under such constraints and chose instead to testify under oath." *Id.* at 595. On appeal, Echavarria

contended the court violated his right to allocution. Echavarria claimed that "'the defendant has an unbridled right to introduce competent evidence in mitigation . . . include[ing] an unrestricted right to allocution should [the] same be the decision of the defense in lieu of sworn testimony.'" *Id.* The Nevada Supreme Court disagreed, holding the right to allocution is not without constraints. *Id.* 595-96.

> The right of allocution is not intended to provide a convicted defendant with an opportunity to introduce unsworn, self-serving statements of his innocence as an alternative to taking the witness stand. The proper place for the introduction of evidence tending to establish innocence is in the guilt phase of trial. At the penalty phase, the defendant's guilt has already been assessed and is no longer in issue. *See Homick* at 134, 825 P.2d at 605 (quoting *State v. Zola,* 112 N.J. 384, 548 A.2d 1022, 1046 (1988), *cert. denied,* 489 U.S. 1022 (1989). If Echavarria had managed to present the same information in an unsworn statement that he did under oath, he would have been subject to corrective action by the court, including possible cross-examination, as he disputed some of the testimony which had been introduced, offered new evidence and asserted that some of the State's witnesses had lied. *See Zola*, 548 A.2d at 1045 (right of allocution does not permit defendant to rebut facts in evidence, to deny his guilt, or to voice evidentiary facts). The district court's admonition to Echavarria concerning the scope of his statement in mitigation was proper and not a denial of Echavarria's right of allocution.

Id. at 596.

The Nevada Supreme Court earlier decided *Homick v. State*, 825 P.2d 600 (Nev. 1992). *Homick* also involved a murder conviction where the death sentence was affirmed. Homick complained that the trial judge committed reversible error when it allowed the prosecutor to comment on Homick's allocution. The Nevada court relied on the New Jersey *Zola* decision and wrote:

> The New Jersey Supreme Court focused on the concern of the prosecution that a defendant should not 'be permitted to lie with impunity to a jury that is attempting to reach a rational fact-based conclusion on whether he shall live or die.' *Zola*, 548 A.2d at 1045. The *Zola* court wisely determined that a defendant 'would not be permitted to rebut any facts in evidence, to deny his guilt, or indeed, to voice an expression of remorse that contradicts evidentiary facts.' *Id. See also State v. Mak*, 105 Wash.2d 692, 718 P.2d 407, *cert. denied* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986) (allocution rule does not contemplate the defendant presenting evidence on the issue before the jury that would be unsworn, unrebuttable, uncross-examined and unanswerable by argument). The reasoning of the *Zola* and *Mak* courts is persuasive. Prior to commencing the penalty phase of trial and the imposition of sentence, issues of guilt and innocence have been considered and

> decided adversely to the defendant. They should not be reintroducible through an unsworn statement by the defendant under guise of the right of allocution.

Homick, 825 P.2d at 604. Once the defendant exceeds the scope of proper allocution, anything said is subject to cross-examination. *Id.* at 604-05. The Court further held:

> Homick utilized his moment of allocution to stray far beyond facts in mitigation of sentencing or pleas for leniency; instead Homick proclaimed his innocence and revisited facts and testimony of relevance only during the guilt phase of his trial. During his comments, he stated that "Michael Dominguez told me of who and what happened regarding Tipton." Homick also declared that "I never confessed to Tim Catt" and that the State's witnesses during the guilt phase were liars. These are precisely the type of improper remarks that justify prosecutorial impeachment if the trial judge fails to suppress their introduction by the defendant.

*Id.*at 605. The Nevada Court then ruled the trial judge must allow a defendant to be impeached if "the trial judge fails to suppress their introduction by the defendant." *Id.*

As in the above cases, the Court permitted Abdullah to allocute but, when concerns were raised as to the content of his allocution, the Court warned Abdullah concerning the proper scope of allocution. The Court gave Abdullah more latitude than that allowed in other states, and only warned against presenting evidence or commenting upon the evidence without being under oath or subject to cross-examination. The Court informed Abdullah that he could proclaim his innocence but that he could not attempt to introduce evidence of his innocence during the sentencing phase. In response, Abdullah chose not to allocute.

B. New evidence concerning guilt should not be admitted during the sentencing phase.

After the defense had rested its mitigation case during the sentencing phase, Abdullah decided he wanted to testify that he did not know Steven Bankhead[6] and to generally testify about matters relevant to his guilt. Over the State's objection, in an exercise of discretion, the Court ruled it would allow the defense to reopen its mitigation case to allow Abdullah to take the stand to present evidence in mitigation. However, Abdullah also indicated that he intended to tell the jury that there is so much they did not know about what happened, the Court reminded Abdullah the testimony had to be relevant to mitigation or in opposition to aggravation and not concerning guilt. The Court ruled that evidence concerning guilt was irrelevant because the jury had already found

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[6] Steven Bankhead was a witness put on by the State as part of its aggravation case.

him guilty beyond a reasonable doubt.[7] His innocence was no longer at issue. As stated by the Nevada Supreme Court in both *Echavarria* and *Homick*, "the proper place for the introduction of evidence tending to establish innocence is in the guilt phase of trial. At the penalty phase, the defendant's guilt has already been assessed and is no longer in issue." *Echavarria*, 839 P.2d at 596. Evidence that is not in issue is not relevant. I.R.E. 401,[8] 402.[9] Abdullah was given an opportunity to take the stand in the guilt phase and again, after consulting his attorneys, chose to not testify.[10] Evidence of guilt is not relevant to any mitigator.

Moreover, while evidence relating to a defendant's innocence could be relevant when residual or lingering doubt[11] is appropriately considered in a sentencing proceeding, the Idaho Supreme Court has held otherwise. It considered the issue of whether a trial judge should consider lingering doubt during a capital sentencing and ruled it was improper. Thus, while Abdullah did not request to argue lingering doubt, in Idaho it would not have been relevant. In *State v. Hairston*, the Idaho Supreme Court held, "the court was not required to consider any doubt about who committed the murder; this question was decided by the jury, and need not be considered in the penalty determination phase." 133 Idaho 496, 517, 988 P.2d 1170, 1191 (1999) *cert. denied*, 529 U.S. 1134 (2000)(emphasis added).

Hairston had been convicted by a jury of two counts of first-degree murder and one count of robbery. Hairston and his co-defendant, who pled guilty, were charged with entering a home while passing through Idaho, killing the couple that lived there and invited them in, and robbing the home. During Hairston's trial he took the stand and testified that he did not shoot the couple and had never seen the gun or shot one. To rebut this testimony the state's witness testified that he had been with Hairston when Hairston entered a store in Colorado, shot a clerk with the same gun used to kill the Idaho couple and robbed the store. The jury found Hairston guilty of first-

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[7] It would be particularly troublesome where a new jury was impaneled for sentencing or where an alternate replaced a guilt phase juror during sentencing. It could potentially require the State to repeat the entire guilt phase.

[8] " 'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[9] ". . . Evidence which is not relevant is not admissible."

[10] The Court carefully inquired of Abdullah whether this was his decision to not testify. The Court explained to him it was not up to his attorneys or a matter of strategy.

degree murder and the judge sentenced him to death. *Id.* at 500-01, 988 P.2d at 1174-75. On post-conviction relief and automatic appeal, Hairston contended that the trial court erred in not considering "lingering doubt" as a mitigating factor. *Id.* at 517, 988 P.2d at 1191. The Supreme Court ruled in relevant part as follows:

> The court was not required to consider any doubt about who committed the murder; this question was decided by the jury, and need not be considered in the penalty determination phase.

Id. at 517, 988 P.2d at 1191 (emphasis added).

Furthermore, the United States Supreme Court held, in a plurality decision that lingering or residual doubt is not a mitigating factor. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). The United States Supreme Court wrote:

> Our edict that, in a capital case, " 'the sentencer . . . [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense,'" *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982) (quoting *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964), in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubt" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Franklin, 487 U.S. at 174. In *Franklin*, Franklin had been convicted of first-degree murder and sentenced to death. The plurality of the United States Supreme Court held that the Eighth Amendment along with its holding in *Lockett* requiring a sentencer to consider all mitigating factors, does not require lingering doubt to be considered a mitigating factor. *Id.* While consideration of lingering doubt as a mitigator in a capital case is not required by the Federal Constitution, each state is free to make its own determination as to the applicability of lingering doubt in a capital sentencing hearing. *Id.*

Overall, lingering doubt is not required to be considered and in many jurisdictions, its consideration is not allowed. *See State v. McGuire*, 686 N.E.2d 1112 (Ohio 1997) *cert. denied*, 525

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[11] During the sentencing phase, Abdullah only indicated he wanted to re-open the guilt phase and present new evidence regarding his guilt. The Court found that this would be improper. The defense did not indicate it wanted to argue "lingering doubt."

U.S. 831 (1998)(holding residual doubt is not an appropriate factor to be considered in mitigation); *Bussell v. Commonwealth*, 882 S.W.2d 111, 115 (Ky. 1994) *cert. denied,* 513 U.S. 1174 (1995)("Residual doubt of guilt is not a mitigating circumstance."); *State v. Hill*, 417 S.E.2d 765, 778-79 (N.C. 1992)("Trial courts should not submit lingering doubt of guilt as a mitigating circumstance."); *Sims v. State*, 681 So.2d 1112, 1117 (Fla. 1996) *cert. denied,* 520 U.S. 1199 (1997)("We have held that residual or lingering doubt of guilt is not an appropriate mitigating circumstance."); *People v. Hooper*, 665 N.E.2d 1190, 1196 (Ill. 1996) *cert. denied,* 519 U.S. 969 (1996)("Residual doubt is not relevant to the circumstances of the offense or to the defendant's character and, as a result, is not relevant to the imposition of the death penalty.") On the other hand, some states allow it to be argued at sentencing if requested. For example, California allows it to be considered and it is generally up to the judge to determine if it is proper. *People v. Valdez*, 82 P.3d 296, 338 (Ca. 2004). The California court in *Valdez*, however, noted that neither state nor federal law requires an instruction on residual doubt be given. *Id.*

Therefore, based on the above analysis, the Court ruled that Abdullah could not reopen the guilt phase during the sentencing phase through his testimony. Based on the Court's ruling, Abdullah chose to not testify during the sentencing phase.

Dated this 3rd day of January 2005.

Cheri C. Copsey
District Judge

APPENDIX B

C. Trial Counsel Did Not Tell Abdullah He Could Challenge Evidence During Allocution. (Claim F)

Abdullah claims that his trial counsel told him he would be able to challenge evidence produced in the guilt phase as part of his allocution. He calls this "telling his story." He claims that this advice caused him to waive his right to testify during the guilt phase and, thus, his rights were violated. Based on the evidence produced during these post-conviction proceedings and trial counsel's credible testimony, the Court finds trial counsel did not tell Abdullah he could dispute the evidence produced in the guilt phase during his allocution.

The right of allocution is "time-honored," dating back to 1689. *State v. Gervasi*, 138 Idaho 813, 816, 69 P.3d 1074, 1077 (Ct. App. 2003). However, not all jurisdictions allow allocution to the sentencing jury in a capital case.[175]

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[175] Jurisdictions that do not recognize a right to allocute in capital cases reason that the better course is to conclude that there is no right of allocution within the structured setting of a capital sentencing hearing. *State v. Perkins*, 481 S.E.2d 25 (N.C. 1997) ("a defendant does not have a ... statutory ... or common law right to make unsworn statements of fact to the jury at the conclusion of a capital sentencing proceeding"), *cert. den.*, 522 U.S. 837 (1997); *Duckett v. State*, 919 P.2d 7, 22 (Okla.Crim.App. 1995) (in capital case, court concluded that "there is no statutory ... [or] common-law ... right of a defendant to make a plea for mercy or otherwise address his sentencing jury, in addition to closing argument by counsel"), *cert. den.*, 519 U.S. 1131 (1997); *State v. Stephenson*, 878 S.W.2d 530, 552 (Tenn. 1994) ("there is no statutory ... [or] common-law ... right to allocution in a capital case"); *see U. S. v. Hall*, 152 F.3d 381, 392–93 (5th Cir. 1998) (concluding that trial court did not violate former rule 32[c][3][C] of Federal Rules of Criminal Procedure, which required court, before imposing sentence, to address defendant personally and to determine whether defendant wished to make statement or to present information in mitigation of sentence, when trial court denied defendant opportunity to make unsworn statement of remorse to capital sentencing

Allocution is not made under oath and is not subject to cross-examination. It has been described as "the right of the defendant to stand before the sentencing authority and present an unsworn statement in mitigation of sentence, including 'statements of remorse, apology, chagrin, or plans and hopes for the future.'" *See Homick v. State*, 825 P.2d 600, 604 (Nev. 1992); *DeAngelo v. Schiedler*, 757 P.2d 1355, 1358 (Or. 1988)). It is not, however, a constitutional or due process right. *Gervasi*, 138 Idaho at 816, 69 P.3d at 1077; *U. S. v. Li*, 115 F.3d 125 (2nd Cir. 1997). Idaho Criminal Rule 33(a)(1) gives all criminal defendants, including Abdullah, the right to "make a statement and to present any information in mitigation of punishment." However, it is also may be the subject of limitations. *U. S. v. Biagon*, 510 F.3d 844, 849 (9th Cir. 2007). This is not a case where counsel failed to advise him of his right to allocute, they did. *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Ct. App. 1993). In addition, the Court also advised him of his right to allocute.

Based on the evidence, the Court finds that Abdullah was well aware that he had the right to allocute to present any information in mitigation of punishment and that it was his decision to decide whether to allocute. His trial counsel did not misinform him.

Abdullah, however, indicated to the Court that he wanted to make statements directly challenging his guilt and to introduce evidence to be considered by the jury. Moreover, he wanted to do it without being under oath or subject to cross-examination. As the Court informed him, he could no longer challenge his guilt once the jury had found him guilty and his unsworn statements regarding evidence introduced in the guilt phase was simply not allowed; they were irrelevant and did not constitute mitigation.

1. Idaho does not recognize "residual" or "lingering doubt" as mitigation.

At trial, the Court ruled that evidence concerning any doubt about Abdullah's guilt was irrelevant and could not be the subject of allocution, because the jury had already found him guilty beyond a reasonable doubt; innocence was no longer at issue

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jury but permitted defendant to make statement to court before it announced his sentence), *cert. den.*, 526 U.S. 1117 (1999); *State v. Whitfield*, 837 S.W.2d 503, 514 (Mo. 1992) ("the right of allocution in Missouri does not extend to addressing the jury"); *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989) (concluding that legislature had abrogated common-law rules governing capital cases by replacing them with statutory scheme and finding "no reason in law or logic" why defendants should be permitted to make unsworn statements to juries in capital sentencing hearings), *cert. den.*, 498 U.S. 881 (1990); *State v. Colon*, 864 A.2d 666, 789-790 (Conn. 2004).

and was not a mitigator. Evidence that is not in issue is not relevant or admissible. I.R.E. 401, 402.

While evidence suggesting a doubt as to a defendant's innocence could be relevant in those states that consider "residual" or "lingering doubt" as a mitigator in a sentencing proceeding, the Idaho Supreme Court has ruled that residual or lingering doubt is not a mitigator. In *State v. Hairston*, the Idaho Supreme Court held that "the court was not required to consider any doubt about who committed the murder; this question was decided by the jury, and need not be considered in the penalty determination phase." 133 Idaho 496, 517, 988 P.2d 1170, 1191 (1999) *cert. den.* 529 U.S. 1134 (2000) (emphasis added). *Hairston* was a capital murder case decided before *Ring* where the court imposed the death penalty. On post-conviction relief and automatic appeal, Hairston contended that the trial court erred in not considering "lingering doubt" as a mitigating factor. *Id.* The Idaho Supreme Court ruled that the court had not erred.

Other states have similarly held.[176] Generally, "lingering doubt" is not required to be considered and its consideration is not allowed. *See State v. McGuire*, 686 N.E.2d 1112 (Ohio 1997) *cert. den.* 525 U.S. 831 (1998) (holding residual doubt is not an appropriate factor to be considered in mitigation); *Bussell v. Commonwealth*, 882 S.W.2d 111, 115 (Ky. 1994) *cert. den.* 513 U.S. 1174 (1995) ("Residual doubt of guilt is not a mitigating circumstance."); *State v. Hill*, 417 S.E.2d 765, 778-79 (N.C. 1992)("Trial courts should not submit lingering doubt of guilt as a mitigating circumstance."); *Sims v. State*, 681 So.2d 1112, 1117 (Fla. 1996) *cert. den.*, 520 U.S. 1199 (1997) ("We have held that residual or lingering doubt of guilt is not an appropriate mitigating circumstance."); *People v. Hooper*, 665 N.E.2d 1190, 1196 (Ill. 1996) *cert. den.*, 519 U.S. 969 (1996) ("Residual doubt is not relevant to the circumstances of the offense or to the defendant's character and, as a result, is not relevant to the imposition of the death penalty.")

The Nevada Supreme Court ruled in two capital cases, "the proper place for the introduction of evidence tending to establish innocence is in the guilt phase of trial. At

[176] On the other hand, a few states allow it to be argued at sentencing if requested. For example, California allows it to be considered and it is generally up to the judge to determine if it is proper. *People v. Valdez*, 82 P.3d 296, 338 (Ca. 2004). The California court in *Valdez*, however, noted that neither state nor federal law requires an instruction on residual doubt be given. *Id.*

the penalty phase, the defendant's guilt has already been assessed and is no longer in issue." *Echavarria v. State*, 839 P.2d 589, 596 (Nev. 1992); *Homick v. State*, 825 P.2d 600 (Nev. 1992). Those cases are particularly instructive and have facts very similar to the facts in this case.

Echavarria was convicted of first degree murder and sentenced to death for killing an FBI agent. *Echavarria*, 839 P.2d at 591. During the penalty phase, Echavarria decided to allocute to the jury. Like this case, "[t]he district court agreed to allow such a statement, but cautioned that Echavarria could not attempt to dispute facts in issue or offer facts to exculpate himself. Echavarria decided that he could not effectively express himself under such constraints and chose instead to testify under oath." *Id.* at 595. On appeal, Echavarria contended the court violated his right to allocution. Echavarria claimed that "'the defendant has an unbridled right to introduce competent evidence in mitigation . . . include[ing] an unrestricted right to allocution should [the] same be the decision of the defense in lieu of sworn testimony.'" *Id.* The Nevada Supreme Court disagreed, holding the right to allocution is not without constraints. *Id.* 595-96.

> The right of allocution is not intended to provide a convicted defendant with an opportunity to introduce unsworn, self-serving statements of his innocence as an alternative to taking the witness stand. The proper place for the introduction of evidence tending to establish innocence is in the guilt phase of trial. At the penalty phase, the defendant's guilt has already been assessed and is no longer in issue. *See Homick* at 134, 825 P.2d at 605 (quoting *State v. Zola*, 112 N.J. 384, 548 A.2d 1022, 1046 (1988), *cert. denied*, 489 U.S. 1022 (1989). If Echavarria had managed to present the same information in an unsworn statement that he did under oath, he would have been subject to corrective action by the court, including possible cross-examination, as he disputed some of the testimony which had been introduced, offered new evidence and asserted that some of the State's witnesses had lied. *See Zola*, 548 A.2d at 1045 (right of allocution does not permit defendant to rebut facts in evidence, to deny his guilt, or to voice evidentiary facts). The district court's admonition to Echavarria concerning the scope of his statement in mitigation was proper and not a denial of Echavarria's right of allocution.

Id. at 596.

Homick also involved a murder conviction where the death sentence was affirmed. Homick complained that the trial judge committed reversible error when it

allowed the prosecutor to comment on Homick's allocution. The Nevada court relied on the New Jersey *Zola* decision and wrote:

> The New Jersey Supreme Court focused on the concern of the prosecution that a defendant should not 'be permitted to lie with impunity to a jury that is attempting to reach a rational fact-based conclusion on whether he shall live or die.' *Zola*, 548 A.2d at 1045. The *Zola* court wisely determined that a defendant 'would not be permitted to rebut any facts in evidence, to deny his guilt, or indeed, to voice an expression of remorse that contradicts evidentiary facts.' *Id. See also State v. Mak*, 105 Wash.2d 692, 718 P.2d 407, *cert. denied* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986) (allocution rule does not contemplate the defendant presenting evidence on the issue before the jury that would be unsworn, unrebuttable, uncross-examined and unanswerable by argument). The reasoning of the *Zola* and *Mak* courts is persuasive. Prior to commencing the penalty phase of trial and the imposition of sentence, issues of guilt and innocence have been considered and decided adversely to the defendant. They should not be reintroducible through an unsworn statement by the defendant under guise of the right of allocution.

Homick, 825 P.2d at 604. Once the defendant exceeds the scope of proper allocution, anything said is subject to cross-examination. *Id.* at 604-05. The Court further held:

> Homick utilized his moment of allocution to stray far beyond facts in mitigation of sentencing or pleas for leniency; instead Homick proclaimed his innocence and revisited facts and testimony of relevance only during the guilt phase of his trial. During his comments, he stated that 'Michael Dominguez told me of who and what happened regarding Tipton.' Homick also declared that 'I never confessed to Tim Catt' and that the State's witnesses during the guilt phase were liars. These are precisely the type of improper remarks that justify prosecutorial impeachment if the trial judge fails to suppress their introduction by the defendant.

Id. at 605. The Nevada Court ruled the trial judge must allow a defendant to be impeached if "the trial judge fails to suppress their introduction by the defendant." *Id.*

Significantly, the United States Supreme Court held, in a plurality decision, that lingering or residual doubt is not a constitutionally mandated mitigating factor. *Franklin v. Lynaugh*, 487 U.S. 164 (1988).

> Our edict that, in a capital case, "'the sentencer . . . [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense,'" *Eddings v. Oklahoma*, 455 U.S. 104, 110 [citations omitted] (1982) (quoting *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964), *in no way mandates reconsideration by capital juries, in the sentencing phase, of their*

> *'residual doubt' over a defendant's guilt.* Such lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.' This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Franklin, 487 U.S. at 174 (emphasis added). In *Franklin*, Franklin had been convicted of first-degree murder and sentenced to death. The plurality of the United States Supreme Court held that the Eighth Amendment along with its holding in *Lockett* requiring a sentencer to consider all mitigating factors, does not require lingering doubt to be considered a mitigating factor. *Id.* While consideration of lingering doubt as a mitigator in a capital case is not required by the Federal Constitution, each state is free to make its own determination as to the applicability of lingering doubt in a capital sentencing hearing. *Id.*

In *Oregon v. Guzek*, 546 U.S. 517 (2006), the Supreme Court again held that neither the Eighth nor the Fourteenth Amendment granted a capital murder defendant the right to present further alibi evidence at resentencing that was inconsistent with his prior conviction, where the evidence shed no light on the manner in which the crime was committed and where there was no contention that the evidence was unavailable to him at time of the original trial. The Supreme Court pointed out that the Eighth Amendment guarantees a reliable determination that death is the appropriate penalty in the specific case, and mandates that the sentencing jury in a capital case be able to consider and give effect to mitigating evidence about the defendant's character or record, or about the circumstances of the offense. However, the Supreme Court explained, the Eighth Amendment does not strip the State of its power to set reasonable restraints on the evidence that the defendant may adduce at the penalty phase, and the discretion to control how it is submitted. Instead, the Supreme Court emphasized, the states may regulate how the fact-finder considers the mitigating evidence, so as to assure a more rational and equitable administration of the death penalty.

Thus, Abdullah had no right to allocute to his innocence.

2. Abdullah could not present unsworn factual statements to the jury in allocution.

In addition, Abdullah wanted to present unsworn and factual statements to the jury in his allocution without subjecting himself to cross-examination and the Court informed him he could not. That advice was well founded on law. A defendant has no constitutional right to use "allocution as a vehicle for presenting unsworn (and often factual) testimony to the sentencing jury without subjecting himself to government cross-examination." *Green v. French*, 143 F.3d 865, 877 (4th Cir. 1998) *cert. denied*, 525 U.S. 1090 (1999), *abrogated on other grounds* by *Williams v. Taylor*, 529 U.S. 362 (2000). Several state courts have also considered the issue of the proper scope of allocution.

A defendant, "is not authorized to argue legal points, advance or dispute facts, or attempt to exculpate himself." *Green v. French*, 143 F.3d at 877. "A defendant should limit himself to standing before the jury and, in his own voice, asking that his life be spared." *State v. Loftin*, 680 A.2d 677, 709 (N.J. 1996). If a defendant attempts to "dispute facts in issue or offer other facts to exculpate himself, he 'will be subject to corrective action by the court including either comment by the court or prosecutor or in some cases possible reopening of the case for cross-examination.'" *Id.* As the New Jersey court opined:

> 'the purpose of allocution is twofold. First, it reflects our commonly - held belief that our civilization should afford every defendant an opportunity to ask for mercy. Second, it permits a defendant to impress a jury with his or her feelings of remorse.' However, a defendant's allocution should not take on a testimonial color. To allow defendant to testify about mitigating or aggravating factors without permitting the State to cross-examine him would be unfair to the State and could have the effect of misleading the jury.

Loftin, 680 A.2d at 709-710. The New Jersey high court held that the trial court could take corrective action which might include comment by the court or prosecutor, or, in some cases, reopening the case for cross-examination. *Id.* at 710.

Likewise, in *State v. Lord*, 822 P.2d 177, 216 (Wash. 1991) *cert. den.*, 506 U.S. 856 (1992), the Washington Supreme Court likewise held that when the defendant exceeds the scope of allocution, the appropriate remedy is to allow the prosecution to cross-examine the defendant. Similar to Abdullah's intended allocution, Lord sought "the

right, at the end of the penalty phase of the trial, to present evidence on the issue before the jury which would be uncross-examined, unsworn, unrebuttable and unanswerable by argument." *Id.* The Washington Court wrote:

> During his statement to the jury, Lord said that he had never asked anyone to lie for him. He denied making the statements to which the jail trustees testified. He said that law enforcement officers had 'changed around' statements he made to them. He then stated: "then there was, since I didn't get to testify, my lawyers thought that was the wrong thing for me to do, which I wanted to but I was told not to, and I just would have liked to have been able to testify to be able to say my part of the story, you know. Because after I left the Fryes' house, September 16th, I went to my brother's, straight to my brother's, and from there I never left my brother's property, never." He went on to relate his problems with drugs and alcohol and his prior criminal history, including facts about the unlawful imprisonment conviction. He concluded by stating that the County, the police and the prosecutor had lied during trial.

Id. at 217. After this statement, the trial judge allowed the prosecution to cross-examine Lord "regarding his statement that he had not asked any witness to lie for him, his statement regarding leaving the Fryes', and his prior criminal record." *Id.* The Washington Court held that, in essence, Lord did not allocute but gave testimony, thus opening himself up to cross-examination. *Id.* Abdullah likewise wanted to introduce evidence.

The Washington Court also held it would be a misuse of the right to allocute for a defendant to go beyond a plea for mercy and begin discussing the crime itself. *Matter of Personal Restraint of Benn*, 952 P.2d 116, 127-28 (Wash. 1998). In *Benn*, similar to what Abdullah intended to do, the defendant "began his allocution by saying 'the truth never came into this trial. I was convicted by three false witnesses,' and then proceeded to give unsworn testimony as to his version of events." *Id.* at 128. The Washington Court found that the only legitimate purpose for allocution is for defendant to express remorse and ask for mercy. The Washington Court further observed that in instances when the scope of allocution is exceeded, the defendant may be cross-examined. *Id.* at 127.

Therefore, Abdullah had no right to present unsworn testimony to the jury in allocution.

3. Trial counsel did not tell Abdullah he could dispute the evidence in allocution.

The Court finds that his trial counsel properly advised him and encouraged him to allocute; they did not tell him he could dispute guilt phase evidence during allocution. Evid. Hearing Tr. p. 1230, ln. 12 - p. 1231, ln. 4; p. 1232, lns. 8-20. Indeed, trial counsel, Mitch Toryanski, credibly testified that they did not advise Abdullah to waive his right to testify during the guilt phase because he would be able to challenge guilt phase evidence during allocution and not be subject to cross examination. *Id.* In fact, trial counsel credibly testified he would not have told him anything like that. *Id.* The Court finds that his testimony is credible.

The Court further finds that Abdullah's trial counsel were prepared to help Abdullah present proper mitigation during allocution including helping him display photographs and going over material. Evid. Hearing Tr. p. 1231, lns. 1-11; Evid. Hearing Tr. p. 388, lns. 4-6; Trial Tr. Vol. VIII, p. 479, lns. 4-9. Trial counsel credibly recalled explaining to Abdullah the allocution rules described by the Court. Evid. Hearing Tr. p. 1231, ln. 16 - p. 1232, ln. 7.

4. Abdullah did not demonstrate any prejudice.

Finally Abdullah did not demonstrate that the result would have been any different "but for" his failure to allocute. Anything Abdullah would have told the jury during allocution, including attacking evidence admitted in the guilt phase, could have no effect on the guilty verdict. Once found guilty, that verdict would not be affected by anything he said in allocution. Therefore, there is no evidence that any such advice, even if given, could have affected his decision to waive his right to testify during the guilt phase.

Likewise, there is no evidence that his failure to allocute affected the jury's decision in the penalty phase. Moreover, at the end of the penalty phase after the defense had rested, the Court unmistakably offered Abdullah the opportunity to re-open the sentencing phase and take the stand and testify, but he refused. Trial Tr. Vol. VIII, pp. 426-37.[177] In other words, even if there had been prejudice to the decision during the

[177] Abdullah claims on post-conviction that he was never informed by his attorneys that the Court would reopen the penalty phase and allow him to testify even though the defense had rested. *See* Final Amended

penalty phase, the Court cured it. It was clear based on the colloquy between the Court and Abdullah, however, that he did not want to be subject to cross examination and that he was concerned about testifying without being questioned. Trial Tr. Vol. VIII, pp. 478-88.

Based on the evidence produced at the evidentiary hearing, the Court finds that trial counsel did not mislead Abdullah. They did not tell him he could challenge or dispute evidence produced in the guilt phase during allocution and not be subject to cross examination. The Court further finds Abdullah has not shown any prejudice.

Therefore, this claim is dismissed.

APPENDIX C

6. Jury selection decisions do not support Abdullah's claims. (**Claim EE**)

Abdullah claims that trial counsel were ineffective in jury selection in several respects. He complains that his trial counsel: (1) improperly stipulated to excuse certain jurors for cause prior to voir dire based solely on their jury questionnaire responses; (2) improperly applied the "Colorado Method" and generally failed to conduct an adequate voir dire; and (3) failed to move to strike certain jurors for cause and utilize preemptory challenges to strike biased jurors.

The jurors were each provided a forty-five page questionnaire that included general background questions, as well as, questions about the jurors' knowledge of the law, the facts of the case, and their views about the death penalty. With regard to the death penalty, while Abdullah and his post-conviction counsel only focus on one answer to an isolated question, the questionnaire included a long section on attitudes toward the death penalty, in addition to other sections designed to elicit additional information. The section devoted to ferreting out attitudes toward the death penalty that read as follows:

V. ATTITUDES[95]

1. One of the crimes the Defendant is charged with is First Degree Murder. If he is found guilty of First Degree Murder, it is possible that the death penalty could be imposed. Under Idaho law, the jury would have to decide whether to impose the death penalty. Persons convicted of First Degree Murder cannot automatically be given the death penalty. Before the jury could impose the death penalty, there would have to be a hearing on the appropriate penalty, and the jury would have to find that the death penalty was appropriate under the guidelines set by Idaho law. Additional evidence may be presented regarding the appropriate penalty.

How do you feel about the death penalty?_____

Do you support or oppose the death penalty?

Support____ Oppose _____

Do you feel that your views on the death penalty would prevent or substantially impair your ability to view the facts impartially?

Yes _____ No _____

Do you feel that your views on the death penalty would prevent or substantially impair your ability to return a guilty verdict of First Degree Murder against the Defendant even if the State had proven its case beyond a reasonable doubt. Yes _____ No _____

If "yes," please explain. _____

2. Do you feel the death penalty is used: (**Check One**)

_____Too often _____Too seldom _____Don't know

Please explain. _____

3. In 2003, Idaho's Legislature revised its law on procedures to be used in invoking the death penalty.

During the 2003 legislative session, did you contact your representatives in the Idaho legislature regarding this issue? Yes _____ No_____.

If you had a chance to vote today on legality of the death penalty in Idaho, would you: (**Check One**)

___ Vote for the death penalty

___ Vote against the death penalty

___ Not vote on the death penalty issue

4. Have you ever actively supported any measure to reinstate or abolish the death penalty in Idaho? Yes ____ No ____

[95] The questionnaire included additional lines for answers to each question in order to encourage complete answers.

If your answer was "Yes," please indicate which you supported: (Check One)

Reinstate Death Penalty _____ Abolish Death Penalty _____

5. Have you ever held a different view on the death penalty?

Yes _____ No _____

If "yes," what was your prior view and why did you change it? _____

6. There have been a number of cases recently discussed in the news media concerning murder trials, the death penalty, and executions. Have you followed any of these stories? Yes _____ No _____

If "yes," which stories did you follow, and what, if any, effect did it have on your opinion about the death penalty?_____

7. Regarding the death penalty, which of the following statements most *accurately* represents the way you feel? (CIRCLE ONE)

a. If a person is convicted of murder and the death penalty is requested, I will always vote to impose it, regardless of the facts and the law in the case.

b. I am strongly in favor of the death penalty, and would have a difficult time voting against it, regardless of the facts of the case.

c. I generally favor the death penalty, but I would base a decision to impose it on the facts and the law in the case.

d. I am generally opposed to the death penalty, but I believe I can put aside my feelings against the death penalty and impose it if it is called for by the facts and law in the case.

e. I feel that my opposition to the death penalty will make it difficult for me as a juror to reach a verdict of guilty or not guilty, despite the facts and law in the case.

f. I am strongly opposed to the death penalty, and I will have a difficult time voting to impose it, regardless of the facts and the law in the case.

g. I am personally, morally, or religiously opposed to the death penalty, and would never vote to impose it, regardless of the facts and the law in the case.

8. If you believe in the death penalty, how strongly, on a scale of 1 to 10, do you hold that belief? **(1 being least and 10 being most)** _____

9. If you are in favor of the death penalty in some cases, do you agree that a sentence of life in prison, rather than the death penalty, would be appropriate under the proper circumstances in some cases? __ yes ___ no

10. The best argument for the death penalty is _____

11. The best argument against the death penalty is _____

12. What would be important to you in deciding whether a person received a death sentence or sentence of life in prison, in a capital murder case? _____

This section was very important in fleshing out juror opinions and beliefs on the death penalty. Abdullah, however, literally ignored juror responses to the entire section and individual responses to other parts of the questionnaire – some of which involved matters potentially relevant to their suitability as jurors on this case.

(a) Pre-voir dire stipulations - not ineffective assistance of counsel.

At the Court's request, prior to voir dire the parties reviewed the answers in the juror questionnaires to determine whether individual jurors should be excused for cause without bringing them into court. The Court told the parties that these jurors would be excused for cause only if the parties stipulated. The Court's intention was to weed out those jurors who either had conflicts or had already formed opinions that precluded them from being fair and impartial.

Abdullah's trial counsel emailed the State a list of thirteen jurors which they believed should be struck for cause because they believed they had already judged Abdullah's guilt, knew some of the witnesses or were very pro-death penalty. The State refused to stipulate to strike any of the jurors requested by Abdullah's trial counsel. The State emailed trial counsel a list of seventeen jurors which they proposed be struck by stipulation. Trial counsel agreed that twelve jurors should be struck for cause, including the following seven jurors, Juror Nos. 12, 15, 64, 75, 82, 117 and 154.

Abdullah asserts that his trial counsel's stipulation to strike these jurors without taking the opportunity to attempt to rehabilitate these "pro-life" jurors objectively fell below an objective standard of reasonableness. During their depositions, nearly four years after the trial, Abdullah's post-conviction counsel asked various questions without ever giving trial counsel the opportunity to review actual juror questionnaires. In fact, Ms. Toryanski stated in her deposition in response to post-conviction counsel's questions about the stipulation "But I can't without looking at more documentation see exactly what the strength of their response" indicating that she needed to see the actual responses.

Final Amended Petition, Addendum 3, p. 595, ln. 25 – pg. 596, ln. 7. Abdullah's post-conviction counsel simply posited the fact that all of these jurors had indicated that they would never impose the death penalty by circling the following statement as most accurately representing their views on the death penalty:

> I am personally, morally, or religiously opposed to the death penalty, and would *never* vote to impose it, *regardless* of the facts and the law in the case

(Emphasis added.) Abdullah appears to argue that this was the only basis for his trial counsel's decision to stipulate to striking these jurors for cause. However, this is misleading. In order to assess trial counsel's strategic decisions, the Court reviewed the context within which it was made.

In fact, jurors had been given seven (7) possible descriptions of their views, not just one, which gave them a number of options as follows:

> Regarding the death penalty, which of the following statements most *accurately* represents the way you feel? (CIRCLE ONE)
>
> a. If a person is convicted of murder and the death penalty is requested, I will always vote to impose it, regardless of the facts and the law in the case.
>
> b. I am strongly in favor of the death penalty, and would have a difficult time voting against it, regardless of the facts of the case.
>
> c. I generally favor the death penalty, but I would base a decision to impose it on the facts and the law in the case.
>
> d. I am generally opposed to the death penalty, but I believe I can put aside my feelings against the death penalty and impose it if it is called for by the facts and law in the case.
>
> e. I feel that my opposition to the death penalty will make it difficult for me as a juror to reach a verdict of guilty or not guilty, despite the facts and law in the case.
>
> f. I am strongly opposed to the death penalty, and I will have a difficult time voting to impose it, regardless of the facts and the law in the case.
>
> g. I am personally, morally, or religiously opposed to the death penalty, and would never vote to impose it, regardless of the facts and the law in the case.

In addition, as demonstrated in the previous section, these responses were only part of the section designed to flesh out their attitudes on the death penalty, and significantly each of

these jurors had other characteristics that would have influenced trial counsel's decision. Abdullah ignores this detail. For example each of the jurors made other statements about the death penalty as follows:

Juror No. 12:[96]

> I am strongly against the death penalty and would never vote for it.
>
> Murder is wrong even if it's the state doing the murdering.
>
> I will not impose a death sentence on anyone.

Juror No. 15:[97]

> I believe that the death penalty is wrong and we shouldn't have to use it.
>
> There should be no death penalty.

Juror No. 64:[98]

> Life is sacred to God, He gave us Life, & He & only He has the right to take life.
>
> Do you feel that your views on the death penalty would prevent or substantially impair your ability to return a guilty verdict of First Degree Murder against the Defendant even if the State had proven its case beyond a reasonable doubt. Yes X No__ Because I don't have the right to rule on a death penalty.

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[96] Juror No. 12 knew 4 potential witnesses and stated that she would give greater weight to one witness's testimony. Furthermore, she indicated that her mother, her sister and friends (plural) were on anti-depressants and as a registered nurse on a psychiatric unit she was knowledgeable about Prozac. She also had been robbed three times and rated defense attorneys as less honest than prosecutors. In light of that – the defense stipulation that she be stricken as a potential juror would have been a reasonable strategic decision. *See* I.C. § 19-2019(2).

[97] Juror No. 15 noted that she had obligations that would make it difficult to serve, because she runs an in-home daycare and would have to pay for care somewhere else leaving her no income for the duration of the trial. Thus, she was likely to be excused for hardship, even if the defense did not stipulate to her dismissal. *See* I.C. § 2-212(3).

[98] Juror No. 64 indicated that he had formed opinions about Abdullah's innocence and that he could not be impartial as a juror. His wife had lived in the Middle East and had told him about "honor killings." He further said that "if it is a capital case – If the death penalty were involved I could not in good conscience rule." In response to the question of whether he would be able to judge whether Abdullah was guilty Juror No. 64 indicated that "no," he would not follow the instructions upon the law given by the judge, explaining, "I cannot decide on a death penalty case." This juror also stated that "as a Jehovah's witness I could not decide if a person's life is involved – of capitol [sic] punishment." Juror No. 64 had been a baptized Jehovah Witness minister for 27 years. He also indicated that he would hold a person's decision to not testify against him and consider his failure to testify an indication of guilt. Finally he thought that a defendant should be required to testify. This witness potentially could taint the entire jury panel and the Court finds that it would have been ineffective assistance of counsel to NOT excuse him without further voir dire. This Court experienced the effect a juror like this can have on an entire panel in another murder case. The result required a completely new panel. *See* I.C. § 19-2019(2).

Juror No. 75:[99]

I have strong emotional feelings about personally imposing the death penalty on another human.

Do you feel that your views on the death penalty would prevent or substantially impair your ability to view the facts impartially? Yes X No __

Do you feel that your views on the death penalty would prevent or substantially impair your ability to return a guilty verdict of First Degree Murder against the Defendant even if the State had proven its case beyond a reasonable doubt. Yes X No __ As I explained before, my personal feelings about condemning another person to death would be a large issue for me

There have been a number of cases recently discussed in the news media concerning murder trials, the death penalty, and executions. Have you followed any of these stories? Yes X No ___

If "yes," which stories did you follow, and what, if any, effect did it have on your opinion about the death penalty? I am familiar with this case and I am personally acquainted with someone who knows the defendant and his deceased wife and kids.

A human being cannot morally pass judgement [sic] to execute another human being.

Juror No. 82.[100]

I feel bad. The life and death should be left to God.

---

[99] Juror No. 75 wrote "I am familiar with this case and I am personally acquainted with someone who knows the defendant and his deceased wife and kids." This juror later indicated that his wife went to school with Angie Abdullah and that Angie was a good person. The juror further indicated that one of the witnesses was his professor and advisor. The juror also indicated that he knew the children. Finally this juror also indicated this knowledge prevented the juror from being fair and impartial and that he had many preconceived notions about the case, including a belief that Abdullah had committed the murder. Clearly, trial counsel should have excused him for cause and not bring him back for further voir dire. *See* I.C. § 19-2019(2).

[100] Juror No. 82 said that she could not serve as a juror because of her inability to understand English and that serving would be a hardship. In addition, she indicated that a defendant should be required to testify. Finally, she indicated that her religious, philosophical or moral belief would not permit her to serve as a juror and reach a verdict because "I cannot judge." In fact, in rating herself, she indicated that she was not a good judge of character. Trial counsel properly agreed to strike her because the Court would never seat someone with limited English, especially in a capital case. *See* I.C. § 2-209(1)(a).

Juror No. 117:[101]

> Killing more people doesn't solve the problem. There's something deeper that must be addressed.
>
> Do you feel that your views on the death penalty would prevent or substantially impair your ability to view the facts impartially? Yes
>
> Do you feel the death penalty is used: (Check One)
>
> X Too often __Too seldom __ Don't know
>
> Please explain. LEGAL MURDER IS NEVER LEGAL
>
> The best argument against the death penalty is they're human beings.

Juror No. 154:[102]

> The best argument against the death penalty is moral grounds.

Moreover, as demonstrated in the footnotes, there were other answers that played into whether these jurors were good jurors. In other words, having actually reviewed the questionnaires, unlike trial counsel when they were deposed by post-conviction counsel, the Court finds that there were many legitimate tactical reasons for the defense to strike each excluded juror.

And while at the evidentiary hearing, post-conviction counsel showed trial counsel some of the questionnaires, there was never any attempt to allow trial counsel a real opportunity to review them.[103] Furthermore, post-conviction counsel confined the

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[101] Juror No. 117 indicated that he thought someone who did not testify was probably guilty or had something to hide. Juror No. 117 indicated he would suffer a loss of his entire semester as a student and that it would cost more than $5600. He also indicated that the timing was particularly bad because of a play he was producing – which for him was the equivalent of a thesis. Thus, there was real hardship and the Court would likely excuse him for hardship. *See* I.C. § 2-212(3). Moreover, jurors in the pool for preemptory challenges only went through Juror No. 116. The last seated juror was Juror No. 103. Accordingly, any juror further down on the roster would not have been considered for the jury regardless of whether the defense agreed to strike them from the panel. Therefore, there is no prejudice for the dismissal of the jurors after 103.

[102] Juror No. 154 also indicated in another section addressing general attitudes that she *strongly* disagreed with the imposition of the death penalty *even* for the worst murderers and that she *could not* vote for the death penalty if she was on a jury. In addition, she indicated that she agreed with the statement "a person would not be brought to trial unless the person was guilty." Likewise, jurors in the pool for preemptory challenges only went through Juror No. 116. The last seated juror was Juror No. 103. Accordingly, any juror further down on the roster would not have been considered for the jury regardless of whether the defense agreed to strike them from the panel. Therefore, there is no prejudice for the dismissal of any jurors after Juror No. 103.

[103] In fact, it appeared to the Court that both the deposition and the questioning at the evidentiary hearing were like a game of "gotcha" where post-conviction counsel would ask long convoluted questions about matters that were approximately 6 years old without giving trial counsel a reasonable opportunity to review

questions to very discrete matters. Finally, several of the prospective jurors identified by Abdullah clearly stated that their personal beliefs against death penalty would interfere with judging Abdullah's guilt or innocence. These statements fall within the "for cause" standards announced in *Witherspoon* and discussed in *Wainwright v. Witt*, 469 U.S. 412, 416 (1985). Jurors may be excluded for cause if they make it

> "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." 391 U.S., at 522, n. 21. . . .

Wainwright, 469 U.S. at 416 (emphasis in original) (quoting *Witherspoon*, 391 U.S., at 522, n. 21). Thus, whether stipulated to or not, these jurors were properly excused from a capital jury for cause where the standard for disqualifying juror is whether juror's views would prevent or substantially impair performance of duties as juror in accordance with instructions.

More significantly, the burden is on Abdullah to establish his claim that their decisions in stipulating fell below an objectively reasonable standard, and he has not met his burden. Abdullah's post-conviction counsel did not give them the opportunity to review the record to determine why they made the decisions they made. At the time they were deposed, those decisions had been made nearly four years previously and as Ms. Toryanski testified:

> We did distinguish between somewhere it was more borderline and didn't stipulate. But there were some that we did not argue over. But I can't *without* looking at more documentation see exactly what the strength of their response. . .

Final Amended Petition, Addendum 3, pg. 595, ln. 25 – pg. 596, ln. 7 (emphasis added). Likewise, as discussed above, briefly handing copies of some of the 45 page questionnaires at the evidentiary hearing did not rectify this problem.

Finally, in *Hill v. Brigano*, 199 F.3d 833 (6th Cir. 1999), a trial court in a capital case dismissed two jurors for cause based solely on their statements that they could not impose the death penalty and actually denied the defendant an opportunity to rehabilitate

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their records. Trial counsel credibly testified that neither had reviewed their records before testifying. Likewise, they credibly testified that they had not conferred about their testimony.

them. The defendant appealed and the Sixth Circuit affirmed his conviction finding that even if the trial court erred, there was no direct evidence demonstrating that the jury actually selected was biased and wrote as follows:

> The defendant also argues that the trial court erred in denying defense counsel the right to rehabilitate two jurors who were dismissed for cause because they stated they could not impose the death penalty. In *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), the Supreme Court held that "the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" We believe that the trial judge's dismissal of these two jurors conformed with the standard announced in *Wainwright*.
>
> When reviewing a trial court's dismissal of potential jurors for cause, this court must determine whether the trial court's decision prevented the empanelling of an impartial jury. It is not enough for the defendant to show that the decision to exclude the two jurors was improper. He also must show that the jury selected was biased. This he cannot do. The Court in *Ross v. Oklahoma*, 487 U.S. 81, 83-85, 108 S.Ct. 2273, 2275-76, 101 L.Ed.2d 80 (1988), addressed the issue of whether the trial court's error in refusing to exclude a potential juror for cause required reversal. The defendant had to exercise a peremptory challenge to exclude this juror after the court refused to remove the juror for cause. *See id.* The defendant argued that had the court properly excluded the juror the resulting jury panel may have been different. *See Ross*, 487 U.S. at 87, 108 S.Ct. at 2277-78. The Supreme Court held that this possibility did not mandate reversal. "[P]eremptory challenges are not of constitutional dimension. They are a means to achieve an impartial jury. So long as the jury that sits is impartial, the fact that the defendant has to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* at 88, 108 S.Ct. at 2278.
>
> In this case, the defendant has presented no direct evidence demonstrating that the jury selected was biased. Even if we determined that the trial court erred in dismissing the two potential jurors without allowing defense counsel the opportunity to rehabilitate them, we cannot grant relief unless we determine that the defendant's right to a fair trial was violated because he was convicted by a biased jury. Finding that the state court's determination that an impartial jury was empaneled is not unreasonable, we deny defendant's request for relief on this claim.

Id. at 844-845 (emphasis added).[104]

In this case, Abdullah provides no direct evidence that the jury as empaneled was biased. Thus, Abdullah has not shown any prejudice. In addition, based on the questionnaires themselves, the Court further finds that Abdullah presented no evidence trial counsel's decisions fell below an objectively reasonable standard. Therefore, the Court dismisses this claim.

(b) Individual juror decisions - not ineffective assistance of counsel.

Abdullah complains about a number of trial counsel's decisions and actions regarding individual jurors during jury selection.

Abdullah first claims that trial counsel "failed miserably" at utilizing the "Colorado Method." This Method was developed specifically for capital cases and is designed to rate potential jurors on a scale of 1 through 7 based on their views on the death penalty. Using that Method a scaled score of 1 would be a juror who would never under any circumstances give death, and 7 would be a juror who would always give death. However, contrary to Abdullah's claim, there is no one technique for voir dire -- even in a death penalty case. The Colorado Method is just one technique. It was developed by one public defender's office as a method for selecting jurors. Final Amended Petition, p. 265, Addendum 76; *see* Answer to Amended Petition for Post Conviction Relief and Brief in Support of Motion for Summary Disposition, pp. 146-47, Addendum 2. While Abdullah's witness, David Lane, claims that this method has proven successful, he produced no evidence to support that opinion.

As the State observed, this technique was developed by the Office of the Colorado State Public Defender's Office and is sold only to defense counsel. In fact, the State was unable to obtain a copy of it. The Court agrees with the State that "it is in the interests of that office to promote that technique as the only acceptable way to do jury selection, but doing so amounts to an advertising campaign." Answer to Amended Petition for Post Conviction Relief and Brief in Support of Motion for Summary Disposition, p. 146.

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[104] In a pre-*Ring* case in Idaho where the judge and not the jury decided the penalty, a trial court was not required to allow individual voir dire of a prospective juror before disqualification based on his objection to the death penalty where the juror stated that his convictions prevented him from rendering a guilty verdict of first-degree murder knowing the death penalty was available. *State v. Dallas* , 109 Idaho 670, 710 P.2d 580 (1985).

According to Abdullah's witness, David Lane, it is designed primarily to obtain a life sentence and its focus is not on acquittal. Final Amended Petition, Addendum 76, pp. 2-3. Therefore, while it may be an appealing method for picking a jury focused on the penalty phase, trial counsel are not required to use it; it is only one method.

In addition to more customary goals, the objective of voir dire in a death penalty case, is that "a prospective juror must be able and willing to follow the applicable law in order to be deemed qualified to serve. [footnote omitted] Put differently, when a juror has beliefs that prevent her from following the law, she should be disqualified." *Probing Life Qualification Through Expanded Voir Dire,"* 29 Hofstra L.Rev. 1209, 1220 (2001).[105] To understand the role defense counsel finds themselves in a death penalty case, it is important to understand the jurisprudence behind jury selection in death penalty cases. Like other aspects of death penalty cases, "death is different" even when picking a jury.

i. Jury selection jurisprudence in capital cases.

In the seminal case of *Witherspoon v. Illinois* the United States Supreme Court held that while potential jurors may have misgivings about the death penalty in general and oppose it as a matter of public policy if they can put aside those reservations and in compliance with their oaths as jurors consider imposing the death penalty, they may not be automatically precluded from serving as jurors in death penalty cases. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Witherspoon* is a specific "limitation on the State's power to exclude" persons with qualms about the death penalty from capital juries.

After *Witherspoon*, the Supreme Court clarified that a person with absolutist views on the death penalty may be precluded from service, even though those absolutist views are not proven with "unmistakable clarity". *Wainwright v. Witt*, 469 U.S. 412, 422 (1985). It is the trial court's responsibility to assess juror qualification by determining "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* If the trial court is "is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law," the court may disqualify that juror for cause. *Id.* at 426.

[105] This is the article cited by David Lane.

In a third decision, the Supreme Court reiterated that jurors who would "be unalterably in favor of, or opposed to, the death penalty in every case . . . by definition are ones who cannot perform their duties in accordance with law." *Morgan v. Illinois*, 504 U.S. 719, 735 (1992). A juror is not impartial if such juror "in no case would vote for capital punishment, regardless of his or her instructions" or is a juror "who will automatically vote for the death penalty in every case." *Id.* In particular, "juror[s] who will automatically vote for the death penalty in every case" must be disqualified from service, because their presence on the jury would violate "the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment." *Id.* at 729. The right to an impartial jury, guaranteed by the Sixth and Fourteenth Amendments, cannot be secured without "an adequate voir dire to identify unqualified jurors."

The Colorado Method is an extremely restrictive method for choosing jurors in a capital case making death penalty attitudes the only criteria for picking a jury. In fact, Abdullah's witness, David Lane wrote

> Under the Colorado Method, it is absolutely essential that a juror's attitudes about the death penalty be the only criteria for defense counsel in the jury selection.
>
> It may be difficult for some attorneys to deviate from traditional *voir dire* methods which they have used with non-capital clients, or in defense of capital clients in a judge-sentencing state. For example, a defense attorney may have a theory of defense in a murder case that the victim committed suicide and a potential juror who is familiar with and sympathetic to the effect of severe depression. [footnote omitted] This may be the ideal juror in the history of jurors. Defense counsel *must* disregard all of that. The **only** criteria for picking or rejecting a juror are the juror's attitudes about the death penalty. This is because virtually every death penalty case is likely to result in conviction at the guilt phase. [footnote omitted] Even if it is not, utilizing this method will result in generally good jurors from the defense perspective.

Final Amended Petition, Addendum 76, p. 9 (emphasis in original). However, Lane also conceded "[t]his is *not* to say that other traditional inquiries should *not* be made, time permitting.[106] [footnote omitted]." *Id.* (emphasis added). Therefore, the Court finds that it is not ineffective assistance of counsel to generally utilize this method while incorporating more other traditional approaches. That is exactly what trial counsel did.

[106] The Court notes that it placed no time restrictions on jury voir dire.

Therefore, the Court finds that the mere failure to strictly adhere to the Colorado Method by making death penalty attitudes the only criteria does not fall below an objective standard of reasonableness.

ii. Jury selection procedures in the Abdullah trial.

In preparing to select the jury in Abdullah's trial, trial counsel received the completed juror questionnaires five days in advance of individual voir dire. The trial counsel's pre-voir dire assessments were consolidated together on a sheet for use during voir dire. Trial counsel engaged the services of another attorney with experience in voir dire to help them in their questioning. The lawyer assisting them pointed out to counsel engaged in questioning additional information (either from the standard questionnaire, the supplemental questionnaire, or just general follow-up) she thought important to ensure that all defense questions had been answered before a juror was excused. Each potential juror was individually questioned out of the presence of other jurors, and the Court placed no time restrictions on the parties.

During voir dire, trial counsel used a "Juror Rating Form" on each juror and prepared a chart of the jurors. The chart contained a composite of information on each juror and their rating assessment using the Colorado Method. However, they did not strictly adhere to this method. Trial counsel credibly testified at the evidentiary hearing about the various factors they considered during voir dire of each witness, and the Court finds that the final decisions were shared with Abdullah and that had he expressed strong objections, trial counsel would have struck a juror. The Court further finds that their reasoning in picking jurors seemed sensible and did not fall below an objectively reasonable standard. Likewise, trial counsel credibly explained their various decisions in exercising their preemptory challenges and challenges for cause.

The choice of questions to ask prospective jurors during voir dire is largely matter of trial tactics and such decisions made by trial counsel will not be second-guessed on post-conviction review unless based upon inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Milton v. State*, 126 Idaho 638, 888 P.2d 812 (1995). As any experienced trial attorney knows, there are intangible elements to jury selection, which cannot be purchased off of a web site. An ability to connect to a particular juror is a priority. Like credibility, the ability to connect

to a juror is something that you have to be in court to really see. As the State noted, appellate courts give deference to what happened in the trial court because credibility is best done in person. *See U.S. Chanthandara,* 230 F.3d 1237, 1267 (10th Cir. 2000). It is easy to "second guess" trial counsel when post-conviction counsel were not present or tasked with picking the jury and did not observe those intangibles like body language.

As Kim Toryanski testified, "there is an intangible. There is something based upon experience and . . . I wouldn't be able to tell you just by looking at one or two documents what I was thinking and perceiving about a potential juror." Evid. Hearing Tr. p. 138 lns. 19-24. The Court agrees with trial counsel that selecting a jury is more than just applying a rating scale to a juror and also agrees that often it is an intangible based on the actual interaction with that juror. Evid. Hearing Tr. p. 138, ln. 25 - p. 139, ln. 16; p. 141, ln. 19 -p. 142, ln. 12; Evid. Hearing Tr. p. 1045, lns. 18-21. Reviewing trial counsel's decision nearly six years later based solely on the cold record is not a substitute for being there.

The Court finds that Abdullah did not demonstrate that their decisions were the result of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. Likewise, a defendant must also show that the jury selected was biased. *See Ross v. Oklahoma,* 487 U.S. 81, 83-88 (1988). The Court finds that Abdullah failed to prove his claim of ineffective assistance of counsel predicated on jury selection process for two reasons. First, he has not shown the jury was biased. Second, he presented no evidence that any juror was actually prejudiced against him or that trial counsel had real grounds to challenge any of the jurors.

iii. Individual juror decisions - not ineffective assistance of counsel.

Abdullah next dissects each juror questionnaire and in arguing his trial counsel's decisions were deficient, he selectively quotes from those questionnaires. The purpose of voir dire is to identify those matters that would effectively prevent a juror from acting fairly and impartially. This means that trial counsel tries to ferret out both actual and implied bias. *See* I.C. §§ 19-2019, -2020. Abdullah complains that his trial counsel failed to challenge or adequately question Juror Nos. 28, 36, 44, 45, 59, 68, 81, 83, 92, 96, 98, and 103 as well as, two alternate jurors.

Juror No. 28

Abdullah contends that trial counsel's voir dire of Juror No. 28 was deficient because trial counsel deviated from the Colorado Method of "stripping."[107] As noted above, the Colorado Method is only one method for jury selection. Trial counsel used the rating system but also appropriately relied on other factors. Trial counsel properly inquired about what warranted the death penalty and asked the juror if he could "give value and weight" to certain examples of the mitigation evidence. Final Amended Petition, p. 285. While Abdullah criticizes the juror's statement he may believe a law enforcement officer more because an officer has been trained to observe, by itself, this does not demonstrate prejudice toward the State, especially because there were no law enforcement "eye witness" testimony dependent on an officer's training to observe. Trial Tr. Vol. II, p. 427, lns. 3-4. Significantly, with respect to mitigation, Juror No. 28 demonstrated he would be amenable to the mitigation evidence that would be presented in this case. Juror No. 28 and trial counsel had the following discussion as follows:

> A. My personal feelings will be modified by the testimony that's given, and in fact, my personal feelings need to be put aside and I need to focus in on what we are discussing if I do get chosen. No, personal – no, I can't allow personal feelings to really override what's being said.
>
> Q. There are circumstances, though, where you could consider the death penalty as a possible punishment?
>
> A. Yes.
>
> Q. Could you share with us what some of those circumstances might be?
>
> A. Well –
>
> Q. What would be important to you in making that decision?
>
> A. It depends upon the case, you know, if it's – I don't know, if it was mass murder or murder where it was just violently done and destruction of another human being with forethought. I don't know. There's so much to

[107] Lane explained stripping as follows:

> The Colorado Method instructs counsel to "strip" the juror by asking a questions along the lines, "Okay, I want you to assume that we're talking about a guy who wanted to kill, planned the killing, deliberated on it, thought about it, wanted to do it for weeks in advance, and did it without any self-defense, no insanity, no excuses. Now what about the death penalty for someone like that?" It is essential that jurors be "stripped" of any reason not to impose a death penalty to ascertain their true feelings.

Final Amended Petition, Addendum 76, p. 9.

go into this that I really can't speak upon it until I worked on it, being – the material being given to me and I have a chance to assimilate it.

Q. In a situation where you had decided that somebody definitely beyond a reasonable doubt killed another human being, thought about it, decided to do it and then did it, and then we get to a penalty phase and the judge instruct you –

A. Uh-huh.

Q. – on what the law is, what the aggravators could be what the mitigators are, and you are weighing them to decide whether or not to recommend death, if the person who you are making decision about had no criminal record up to that point, is that a mitigator that you could give value to?[108]

A. Yes, it is. The death penalty would be the last choice that I would make.

Q. What about the mitigator that the person had been a good employee in the past? Would that be something that you could give value and weight to?[109]

A. Yes.

Trial Tr. Vol. II, p. 429, lns 8- p. 430, ln 19 (emphasis added). Finally, Juror No. 28 clearly committed to follow the Court's instructions clearly and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. III, p. 416, ln. 1 – p. 419, ln. 1. Trial counsel did not err in choosing not to strike Juror No. 28 from the panel. Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror.

Juror No. 36

Abdullah further argues that trial counsel should have challenged Juror No. 36. In part, he argues that this juror's response indicates that she was death-prone. However, Juror No. 36 indicated that she would only vote for death, after weighing the laws and the facts and all of the circumstances.[110] *See also* Trial Tr. Vol. II, p.558, lns. 8-11. In response to trial counsel's questions, Juror No. 36 agreed she would consider mitigating factors, like lack of criminal record, good work history, public service, good family relationships –all facts applicable to Abdullah. Trial Tr. Vol. II, p. 562, ln. 22 – p. 563, ln.

[108] Abdullah had absolutely no criminal record.

[109] Abdullah was a very good employee.

[110] *See* Court's voir dire -- Trial Tr. Vol. II, p.549, ln. 2 – p. 552, ln. 1.

18. In fact, she said that these factors "just shows part of a person's personality and person, shows their character." Trial Tr. Vol. II, p. 563, lns. 16-18. Finally, Abdullah also claims that Juror No. 36 had already concluded she would find the defendant guilty based on her statement that she would pray with Abdullah at the end if the death penalty were imposed. However, it is clear from the context that she was responding to a hypothetical question; her answer in fact reflects empathy and that she understood the gravity of any such decision -- traits favorable to the defense. *See* Final Amended Petition, p. 287, citing Trial Tr. Vol. II, p. 557, ln. 19-p. 558, ln. 7. Finally, Juror No. 36 clearly committed to follow the Court's instructions clearly and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. II, p.549, ln. 2 – p. 552, ln. 1. Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror. Thus, trial counsel's choice not to strike Juror No. 36 was not error.

Juror No. 44

Abdullah claims trial counsel should have asked Juror No. 44 other questions and that he was inclined to impose the death penalty on any first-degree murder. However, Juror No. 44 actually only marked the strength of his support of the death penalty a six. *See* Jury Questionnaire, Juror No. 44, pg. 18. During a discussion of that belief, the juror acknowledged that he would also consider mitigating factors. Trial Tr. Vol. II, p. 649, ln. 11 – p. 650, ln. 9. Finally, Juror No. 44 clearly committed to follow the Court's instructions clearly and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. II, p.649, ln. 1 – p. 642, ln. 15. Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror.

Juror No. 45

Next, Abdullah contends that trial counsel was ineffective because they asked Juror No. 45 no questions about the death penalty. However, that ignores the answers Juror No. 45 gave on the questionnaire and the fact that both the Court and the State engaged in *Witherspoon* and reverse-*Witherspoon* questioning. Juror No. 45 clearly committed to follow the Court's instructions clearly and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. II, p. 655, ln. 17 –

p. 659, ln. 10. Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror.

Juror No. 59

Abdullah claims that Juror No. 59 should have been stricken for cause (actual bias) because he had an interest in becoming a law enforcement officer and that he had pending applications for work as a police officer. He also claims that he should have been challenged for his death penalty views. However, neither justified striking him for cause. This interest in a career in law enforcement was explored by the Court, the State and Abdullah's trial counsel. In response, this juror clearly stated that he would not be biased in favor of law enforcement or the State. Abdullah has no evidence to the contrary. In light of his unequivocal statement that he could be fair, a motion to strike for cause would not have been granted. Furthermore, while Abdullah claims that Juror No. 59 should have been challenged for his views on the death penalty when the Court questioned him, he clearly committed to follow the Court's instructions and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. II, p. 847, ln. 14 – p. 850, ln. 17. Therefore it was not ineffective assistance of counsel to not ask that he be stricken. Moreover, while initially Abdullah's trial counsel asked the State to stipulate to striking him for cause, the Court finds that trial counsel credibly explained their reasoning for keeping this juror at the evidentiary hearing, including identifying that this juror was intelligent and would not be pushed around. In other words, he would not be overly influenced by other jurors. The Court finds that Abdullah has not sustained his burden to show that this juror was biased or that his trial counsel were ineffective. Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror.

Juror No. 68

While Abdullah acknowledges that this juror was "generally opposed" to the death penalty and that the juror "promised to 'consider' things such as character and background of the person," Abdullah claims trial counsel should have used additional time in voir dire to "empower" her "to maintain her personal moral judgment." As indicated, what questions to ask in jury voir dire is a trial strategy decision and unless Abdullah presents evidence that this juror was *actually* prejudiced against him or that

trial counsel had real grounds to challenge this juror, these decisions do not amount to ineffective assistance of counsel. Finally, the Court questioned him, the juror clearly committed to follow the Court's instructions and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. III, p. 44, ln. 11 –p.48, ln. 10. (Final Petition, pg. 290.)

Juror No. 81

Like his other challenges, Abdullah "cherry picks" his complaints about this juror. He relies largely on Juror No. 81's answers to the questionnaire and ignores his very appropriate answers during voir dire examination. For example, when asked about whether he could apply the law during the penalty phase Juror No. 81 responded,

> I will be very deliberate now that it's done. The way I see it is I try to put myself in that man's position. If that was me sitting there, I would want people to look at everything and weigh it very carefully. I figure at the very least, the man has the potential of the death penalty hanging over his head. And I know if that was me, I would want everybody to look at everything very hard.

Trial Tr. Vol. III, p. 307, lns. 13-19. Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror. Likewise, after the Court questioned him, the juror clearly committed to follow the Court's instructions and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. III, p. 288, ln. 23 –p.292, ln. 19. Trial counsel did not err in allowing Juror No. 81 on the panel.

Juror No. 83

Abdullah also claims that Juror No. 83 should have been stricken for cause because he did not correctly perceive the impact of mitigation evidence, would automatically impose the death penalty and had a scientific background. When the Court questioned Juror No. 83 during jury selection, he clearly committed to follow the Court's instructions and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. III, p. 322, ln. 6 – p. 325, ln. 24. Therefore, he could not be challenged for cause based on his views of the death penalty and failure to challenge him based on death penalty qualifications would not fall below an objectively reasonable standard.

With regard to the role of mitigation evidence, the juror agreed to consider mitigating facts, while also acknowledging that "there are some situations that I do believe are heinous enough and with so much malice that it [the death penalty] is warranted." However, that statement only reflects an interest in weighing the relevant facts before making a decision. In addition, in response to questions by trial counsel, he firmly declared that he would wait to hear all the mitigating facts and circumstances before forming an opinion. *See* Trial Tr. Vol. III, p. 339, ln. 14 – p. 340, ln. 1. Finally with regard to his scientific knowledge, both the State and the Court addressed this concern during voir dire and the juror acknowledged he would be able to follow the Court's instruction and not become a "mini" expert. *See* Trial Tr. Vol. III, p. 326, ln. 16 – p. 327, ln. 15; *see also* Trial Tr. Vol. III, p. 330, ln.24 – p. 331, ln. 19.

Moreover, during the evidentiary hearing, trial counsel credibly testified that they considered certain positive attributes as making him a good juror for Abdullah. They credibly testified that this juror was kind-hearted, open minded to different people, and different cultures. Kim Toryanski based her opinion on the fact the juror told them refugees from Afghanistan, Africa and Iran attended his church and his daughter was a missionary to Africa. These are all things which trial counsel thought would make this a good defense juror given the facts of this case. This decision was not based on a misunderstanding of the law and did not fall below an objectively reasonable standard. In light of Juror No. 83's responses, not challenging Juror No. 83 was not ineffective assistance of counsel; it was a strategic decision. Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror.

Juror No. 92

Abdullah then argues that Juror No. 92 should have been stricken from the panel because she was too much in favor of the death penalty and would not consider mitigation properly. However, Abdullah is wrong. The trial transcript reveals that the juror affirmed she did not believe that death is the only appropriate sentence in a first degree murder case, and agreed that she would consider imposing the death sentence or choose not to after considering all of the evidence, including the aggravating and mitigating circumstances. In fact, when the Court questioned Juror No. 92, she clearly

committed to follow the Court's instructions and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. III, p. 494, ln. 9 – p. 497, ln. 1 – establishing she clearly committed to follow the Court's instructions and to both consider imposing and not imposing the death penalty. Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror. Thus, the claim regarding Juror No. 92 has no merit.

Juror No. 96

Abdullah claims his trial counsel were ineffective for failing to "empower" Juror No. 96. However, he acknowledges that Juror No. 96 was only a 5 out of 10 in support of the death penalty and that "[t]his is an example of a juror who would be amenable to a real consideration of mitigating evidence." In addition, Juror No. 96 clearly committed to follow the Court's instructions and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. III, p. 534, ln. 13 –p.538, ln. 9. The Court finds Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror. Accordingly, he has presented no evidence trial counsel were ineffective.

Juror No. 98

Abdullah objects to Juror No. 98 based on her answers to the questionnaire. However, during voir dire, in response to questions about whether the death penalty is the *only* appropriate penalty for first degree murder, Juror No. 98 responded, "Absolutely not" and goes on to affirm she intended to follow the Court's the instructions and consider both imposing and not imposing the death penalty. Trial Tr. Vol. III, p. 561, lns. 18 -- p. 564 ln. 25. Abdullah also complains that Juror No. 98 described Angie Abdullah's death as tragic and agreed that there must have been "some cause" for Abdullah to be arrested. However, as the State observed, nearly everyone would consider the death of a mother and the near death of her four children was tragic.

The suggestion was that she was pre-disposed to believe the defendant was guilty because he had been arrested. However, trial counsel followed up with a series of questions designed to ferret out her beliefs and she made it clear that she would be able to set those ideas aside and give Abdullah a fair trial. *See* Trial Tr. Vol. III, p. 578, ln. 2 – p.

579, ln. 3. Finally, Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror.

Juror No. 103

Abdullah argues that Juror No. 103 should have been challenged for cause because she remembered some of the original news coverage. However, even Abdullah acknowledges that this juror says several times that she would try to put it out of her mind. Final Amended Petition, p. 282; *see also* Trial, Vol. III, p. 633, lns. 9-16. For example, when asked by trial counsel, "how much in your mind needs to be erased?" The juror responded, "You know, ever since I was here and found out about this case, I have tried very much to not even think about it. I can't say that I haven't a little bit, because just having to come here today made me aware that I would have to answer some questions from you." Trial Tr. Vol. III, p. 633, lns. 16-22. Trial counsel went on to ask, "but you have the ability to follow the Court's instructions and everything that you have learned about this case and just evaluate it from what happens here in this courtroom?" To which, Juror No. 103 responded with a simple, "Yes." *See* Trial Tr. Vol. III, p. 633, ln. 23 – p. 634, ln. 2. Juror No. 103 clearly understood that whatever trace of media coverage may be in the back of her mind, she was to decide the case on what happened in the courtroom. In addition, Abdullah complains that her statement in response to a question about her ability or intent to follow the court's instructions that "what I will try to be [sic]. I'd just as soon prefer not to have to be a juror, to tell you the truth, but if I'm chosen, I will try my very best." Trial Tr. Vol. III, p. 634, lns. 3-6.

Likewise, Juror No. 103 clearly committed to follow the Court's instructions and to both consider imposing and not imposing the death penalty. *See* Court's voir dire -- Trial Tr. Vol. III, p. 615, ln. 25 – p. 620, ln. 4. Finally, Abdullah presented no evidence that this juror was actually prejudiced against him or that trial counsel had real grounds to challenge this juror. But the fact that a juror would rather not be picked for a case that would likely go for three months is not a basis for a challenge for cause.

Alternate Jurors.

Finally, Abdullah claims his trial counsel were ineffective because they did not challenge jurors that ultimately became the alternates. Quite simply because these jurors did not ultimately determine either guilt or the penalty, Abdullah cannot show prejudice.

These claims based on jury selection are dismissed.